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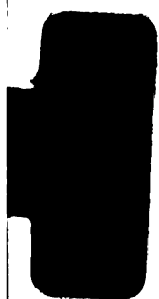
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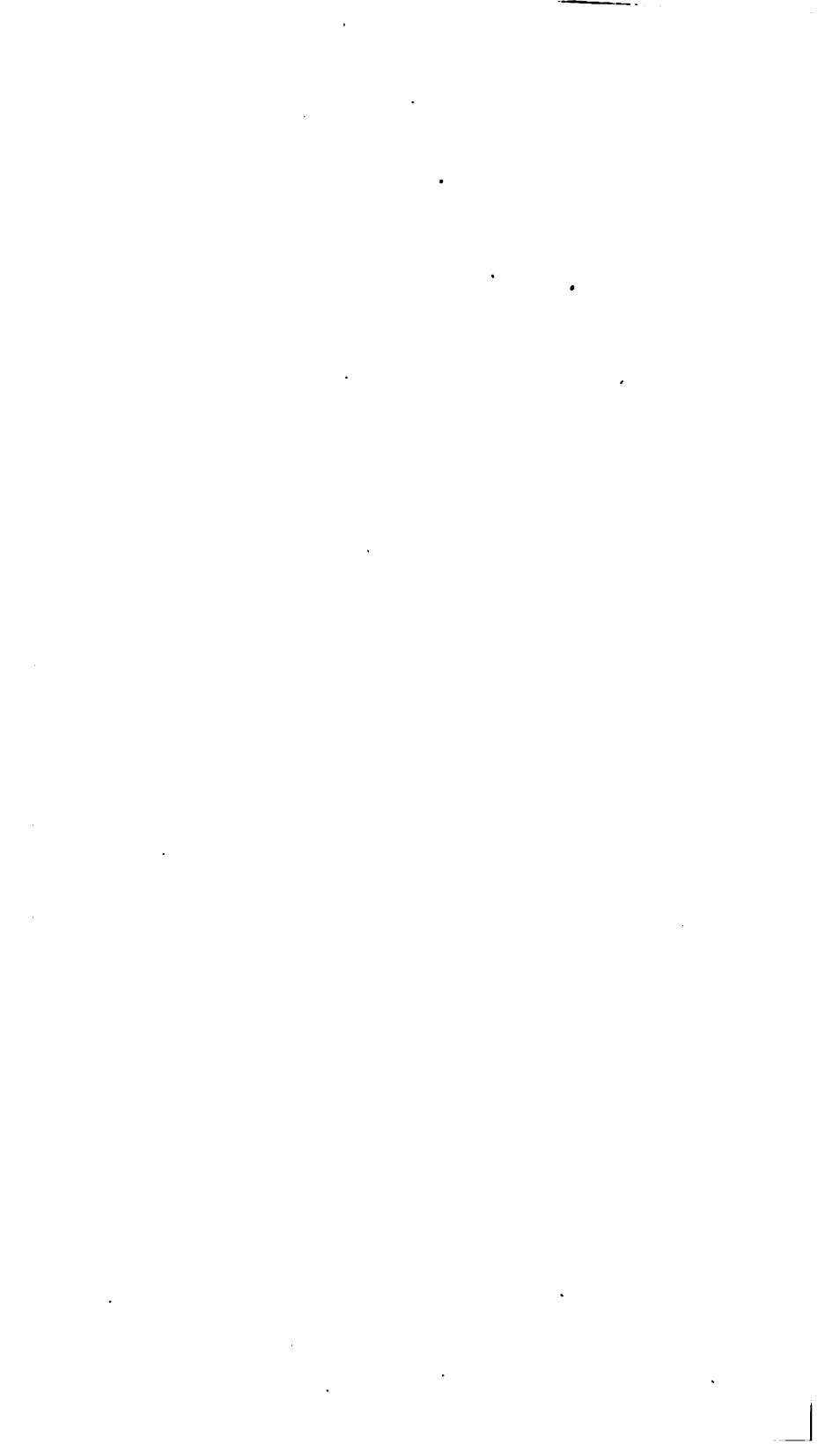
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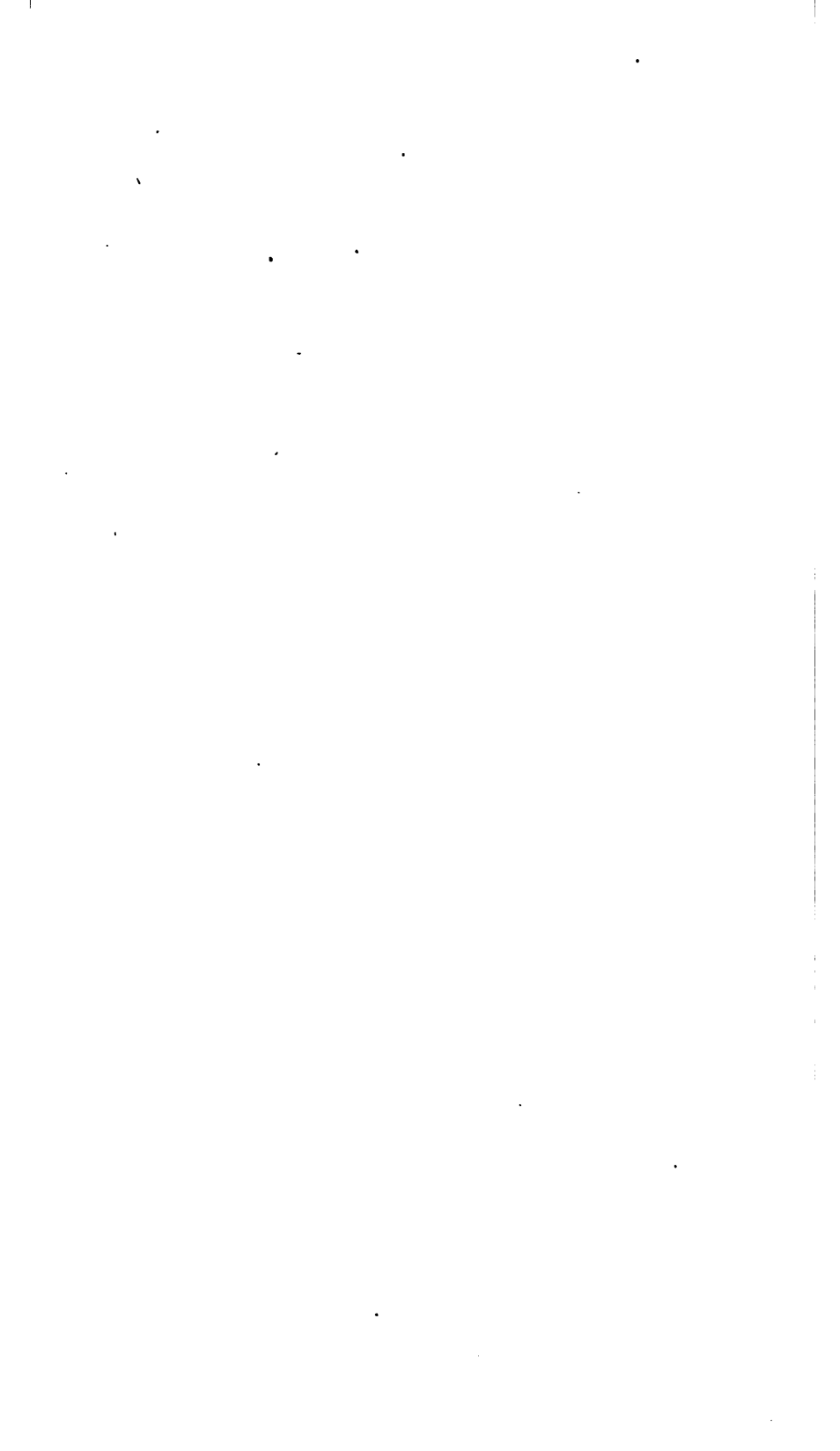
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

Vol. XIV.

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AMERICAN DECISIONS.
VOL. XIV.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

SHARP v. WICKLIFFE.

[3 LITTLE, 10.]

THE RECORDER'S CERTIFICATE THAT A DEED has been recorded pursuant to the requirements of the law, is sufficient to entitle the deed to be read in evidence without further proof of its execution.

WIFE'S PROPERTY NOT LIABLE FOR HUSBAND'S DEBTS.—Personal property conveyed to a trustee for the separate use of a married woman, during her life, is not liable to be taken in execution for her husband's debts.

THE JUDGMENT MUST BE PRODUCED to entitle one, claiming as creditor, to impeach a conveyance as fraudulent; producing copies of the execution is not sufficient.

DECLARATIONS BY THE GRANTOR, after conveyance, and tending to defeat his title, are not evidence.

NEW TRIAL—VERDICT AGAINST EVIDENCE.—A new trial ought not to be granted on the ground that the verdict is against evidence, where the evidence on both sides was merely circumstantial.

WENT of error from the circuit court. The opinion states the case.

Haggin, for the plaintiff in error.

Breckenridge and Wickliffe, contra.

By COURT. This was an action brought by Wickliffe and McKinley against Sharp for the trover and conversion of sundry articles of household furniture. The defendant pleaded not guilty, upon which issue was joined, and on the trial it appeared that James Coleman, formerly a merchant in high credit, suddenly, in 1814, failed for a large amount; that at a sale of his estate, under a deed of trust for the benefit of his wife, Mrs. Meredith, the wife of Samuel Meredith, and the mother of Mrs. Coleman,

bought several articles of household furniture, and that other articles were afterwards manufactured and transferred by the manufacturer to Samuel Meredith. And the plaintiffs offered to read two deeds from Samuel Meredith, conveying to them those articles in trust; that they would permit Mrs. Coleman, the daughter of Meredith, during her natural life, to enjoy the use of those articles, free from the control of her husband, and not subject to his debts and contracts, and after her death, convey the same to her children she might then have living; and if she should leave none, then to Meredith or his heirs. These deeds were certified by the clerk of the county court of Fayette, where the parties resided, to have been acknowledged before him by Meredith, shortly after their dates, and to have been duly recorded in his office; but there was no other proof of their execution. To the reading of them the defendant objected; but the court overruled the objection, and permitted them to be read. The defendant then moved the court to instruct the jury that the interest conveyed by those deeds to the use of Mrs. Coleman was subject to execution for the debts of Coleman, during their joint lives; but the court overruled the motion, and instructed the jury that the interest conferred by those deeds was not liable to execution in favor of Coleman's creditors. The defendant read in evidence two executions against the estate of Coleman, in virtue of which he, as sheriff, had taken the articles of property in contest, and asked a witness, the trustee in the deed from Coleman for the benefit of his creditors, if all or any of the creditors, provided for by that deed, were consulted, or privy to, or approved of its execution, and desired to ask other questions, calculated to show the inefficacy of that deed; but the court, on the motion of the plaintiffs, forbade the question, deciding that the validity of that deed could not be questioned in this suit, and that no inquiries for that purpose were admissible.

The defendant also introduced a witness who deposed that at the request of the administrator of James Hughes, deceased, he had applied to Samuel Meredith for the payment of fees for drawing some deeds of trust, which Meredith refused to pay, alleging Dallam or Coleman must have procured them, and that he had nothing to do with them. But the circuit court, at the instance of the plaintiffs, excluded from the jury all such confessions of Meredith, made since the execution of the deeds of trust to them, as might go to vitiate the said deeds. To these several opinions and decisions of the circuit court the de-

fendant excepted; and a verdict having been rendered against him, he moved the court for a new trial; but the court overruled the motion. To this decision he also excepted, spreading upon the record what is stated to be in effect all the evidence given on the trial; and a judgment having been rendered upon the verdict, he has brought the case to this court by writ of error, with supersedeas.

The points made by the assignment of error grew out of the exceptions taken by the defendant in the circuit court. We shall notice them in the order in which they occur in the statement we have given of the case.

1. The first question to be considered is, whether the circuit court erred in admitting as evidence the deeds from Meredith to the plaintiffs, upon the certificate of the clerk, without other proof of their execution. Of the correctness of this decision we entertain no doubt. The deeds in question were certainly necessary to be recorded, to render them valid against creditors and purchasers; and it is a settled principle, that where the law requires a deed to be recorded, the certificate of the proper officer of its having been duly recorded is sufficient to entitle it to be read, without further proof of its execution.

2. The second point to be noticed relates to the liability of the property conveyed by those deeds to execution for Coleman's debts. That it was not so liable, upon the principles of the common law, is manifest. It is very true that any personal chattel to which the wife is legally entitled, and which comes to the possession of the husband, during coverture, will be liable to be taken in execution against the husband. But the legal title to the property in question in this case was vested by the deeds of trust in the plaintiffs, Mrs. Coleman having thereby only a title in equity to the use of it during her life, and a mere right or title in equity to the use of a thing was not, upon the principles of the common law, subject to execution.

The only statutory provision which has made any change in the common law in this respect, is to be found in the thirteenth section of the act of 1797: 1 Dig. Stat. 315. That section provides that "estates of every kind, holden or possessed in trust, shall be subject to like debts and charges of the persons to whose use or for whose benefit they were or shall be respectively holden or possessed, as they would have been subject to if those persons had owned the like interest in the things holden or possessed, as they own or shall own in the uses or trusts thereof." This provision, according to its literal import, sub-

jects a thing holden to the use of any person to the debts of such person, in the same manner as it was at common law. where he owned the thing itself, and, of course it may be taken and sold under execution; but it is evidently only to the debts of the person for whose use the thing is held that it is made liable, and as the debts of the husband cannot be said to be the debts of the wife, a thing held for her use cannot, according to any rational construction of the provision, be deemed liable to be taken and sold in virtue of an execution against him. Husband and wife are, indeed, to many purposes, considered in law as one person, the very existence of the latter being supposed, in legal contemplation, to be merged in the former. But in equity they are considered and treated as separate persons. They are, in a court of equity, held to be capable of interpleading with each other; and it is an acknowledged principle that the wife may take, through the medium of trustees, an estate in the use of a thing separate from her husband. Now, as the use or trust which is the subject of statutory provision in question, is a mere creature of equity, it is obvious when the legislature speak, in the provision, of the persons to whose use a thing is held that the word persons must be understood in the sense in which it is understood in equity, whose language is used, and, of course, a wife must be, in that sense, a separate person from that of her husband, to whose use a thing may be holden or possessed. We are, therefore, of opinion that the circuit court was correct in deciding that the interest Mrs. Coleman took under the deeds of trust was not liable to execution for Coleman's debts.

3. The third point to be noticed grows out of the refusal of the circuit court to permit the defendant in that court to put interrogatories to the witness, tending to impeach the validity of the deed of trust made by Coleman, for the benefit of his creditors. The deed itself was not produced, nor its absence attempted to be accounted for, and on that ground the propriety of going into evidence to impeach it, might well be questioned; but there is another ground which affords, we apprehend, an insuperable objection to such evidence. The defendant in the circuit court read the executions against Coleman, but he did not produce the judgments on which they issued. Now, as the deed could only be void as against creditors and purchasers, it was essential in order to give the defendant a right to impeach it that he should have produced the judgments, for without the judgments being produced, the plaintiffs in the executions could

not be shown to stand in the relation of creditors: *Peake's Ev.* 174, 418.

4. The fourth point to be noticed is the exclusion by the court, of the confession of Meredith, after the deeds of trust were executed by him to the plaintiffs tending to vitiate them. This was so obviously correct that no question was made of it in the argument. In fact, the point has been long settled by this court that the confessions of a person, made after he has conveyed his title, tending to defeat it, are inadmissible.

5. The fifth and last point relates to the application for a new trial. The grounds of the application are not stated in the record; but we suppose that it must have been on the ground of the verdict being against evidence. We have not thought it necessary to state the evidence at large. The point which seems principally to have been relied on for the defendant, was that the property in question was bought with Coleman's money, and in fact belonged to him. The evidence in support of this point was merely circumstantial, which was opposed by counteracting circumstances; and taken together, the whole evidence was decidedly of that character, the weight of which belonged to the jury to determine; and in such cases the court has invariably refused to disturb the verdict, in opposition to the opinion of the court below.

The judgment must be affirmed with costs and damages.

SPRINGLE v. MORRISON.

[3 LITTELL, 52.]

STATUTE OF FRAUDS—ESTOPPEL.—The statute of frauds will not protect one who is equitably bound to convey land, although by a contract on which no action could be maintained against him by his vendee, and who has represented the title of his vendee to be good, thereby inducing others to purchase from him.

ERROR from the circuit court. The opinion states the case.

Haggin, Clay and Breckenridge, for the plaintiffs in error.

Hardin and Barry, contra.

By COURT. Col. George Nicholas, in his life-time, purchased of Simon Hickey a lot in Lexington, and paid part of the purchase-money. Nicholas afterwards died, having, by his will, devised his estate, real and personal, to his executors, Joseph H. Daviess and James Morrison. In 1803, John A. Seitz re-

covered a judgment in the general court for seven hundred and eighty-four pounds thirteen shillings and four pence against Nicholas's executors, and Daviess, one of the executors, made a verbal arrangement with Seitz to receive the lot in satisfaction of his judgment, and pay the balance of his purchase-money to Hickey. At the same time, Daviess signed a blank paper, on which he made an indorsement in the following words: "*Carte Blanche*.—Morrison and Daviess, executors with J. A. Seitz: agreement to sell the corner lot where Lampton lives in Lexington, for one thousand pounds; Seitz to pay Hickey and redact his own judgment and pay balance, and indemnify the executors against any damage on account of paying those two debts in full. Teste, J. Allen. J. H. D."

This paper was delivered by Seitz to James Hughes, to be filled up with the agreement in form; but Seitz, shortly afterwards went to New Orleans, where he died, and the paper was never filled up, and remained in the hands of Hughes, as it had been delivered to him by Seitz.

John Jordan had been the partner of Seitz, and in the articles of partnership it was stipulated that they should be joint proprietors of all the property, real and personal, vested in either of them; and when Seitz died, Jordan administered upon his estate, and in 1804, he sold the lot purchased of Hickey to William Smith, and received the consideration; and Smith afterwards sold a part of the lot to Springle and Bobb, and received from them the purchase-money therefor. But neither Seitz in his life-time, nor Jordan afterwards, paid Hickey the balance of the purchase-money due him. Jordan at length failed. And Hickey, becoming impatient, threatened to sue Morrison, who, to avoid the consequences, paid Hickey, and took a conveyance to himself of the lot, but refused to convey to Bobb and Springle; and to coerce a conveyance of the part they had purchased, they filed their bill in chancery, in which, after setting forth the purchase by Smith of Jordan, and their purchase from Smith, they charge that Morrison was privy and consented to the sale by Jordan to Smith, and even attested the contract as a witness, setting up no claim to the lot, except to have the privilege of removing or being paid for a shop on the lot, for which he was afterwards satisfied by Jordan; and that he was also privy to their purchase from Smith, and consented to their taking possession, which they have ever since held.

They made the unknown heirs of Seitz, Jordan and Daviess

and Morrison, defendants. Seitz's heirs failed to appear. The other defendants answered; but their answers, except that of Morrison, are not material to be recited. Morrison, in his answer, admits the contract, as before stated, between Daviess and Seitz, and states that he has been always willing, and was then willing, to carry it into effect, according to the terms agreed on. He does not controvert the sale from Jordan to Smith, nor that of Smith to the complainant, but he denies that he was privy or consented to the sale from Jordan to Smith. He admits that he witnessed some paper between them, but denies a knowledge of its contents. He does not deny that he set up claim to the blacksmith shop, and was paid for it; but he denies that he ever signified to the complainant that he had no claim to anything but the shop. After the answers were filed, the suit abated by the death of Bobb and Springle, and a bill of revivor was filed in the name of their heirs.

To that bill, Morrison filed an answer in which he pleaded and relied upon the statute against frauds and perjuries. On a final hearing, the circuit court decreed Morrison to convey to the heirs of Bobb and Springle, upon their paying to him four hundred and twenty-nine pounds, with interest from the first day of June, 1817, until paid, that being the amount paid by him to Hickey. To that decree, Morrison and the complainants have each prosecuted their writ of error. The assignment of error on the part of Morrison questions the propriety of the decree in compelling him to convey upon any terms; and the assignment of error on the part of the complainants controverts the propriety of subjecting them to the payment of the money advanced by Morrison to Hickey.

1. There is certainly some room to doubt whether the memorandum made by Daviess, on the blank paper, was such as to take it out of the statute against frauds and perjuries. But, be that as it may, it evidently did not constitute an obligatory contract. The memorandum was clearly only intended by Daviess as instructions, on his part, of the terms which were to be inserted in the agreement which was to be signed by both parties; and without the signature of Seitz, it wants that mutuality which is essential to a contract that will be enforced in a court of equity. Most unquestionably, therefore, neither Seitz, nor Jordan as his surviving partner, could be entitled to enforce the execution of the contract on the part of Nicholas's executors, without having previously performed the stipulations on their part; and, as a general rule, it is undoubtedly correct that the purchaser of an

equitable title cannot stand in a better situation than the person from whom he bought. But to this rule there are exceptions: for if a person having a right to an estate, encourage or even permit a purchaser to buy it of another, the purchaser will hold it good against the person who has the right. This doctrine is founded on good reason and is abundantly supported by authority: Sug. Ven. 539, and the cases there cited.

Nor is it in conflict with the statute against frauds and perjuries, as is contended on the part of Morrison, for the statute only prohibits the enforcement of an equity derived from a verbal contract for land and cannot be construed to an equity resulting from the fraudulent or wrongful conduct of a party. If then Morrison, as the complainants allege, was privy to the purchase made by Smith of Jordan, and by his acquiescence encouraged Smith to advance his money in making the purchase, he cannot be permitted now to resist the claim of Smith, or that of the complainants who derive their title from Smith, on the ground that Jordan had no right to sell, and that Morrison was present when the purchase was made by Smith, and acquiesced in the purchase, without objecting to Jordan's right to sell, or asserting any claim against the lot, except as to the shop, for which he was paid, is satisfactorily proved in the cause. There is, indeed, no doubt but that Smith knew that there was still a balance due to Hickey; but it is in proof that Morrison, at the time of Smith's purchase, declared that he would look to Jordan for the payment of it; and that he had on that account no claim against the lot. Smith, therefore, though he knew that there was a balance due to Hickey, could have no reason to expect that it would be claimed of him, and of course could have had no inducement to guard the claim in his contract with Jordan; and it is, under these circumstances, much more consonant to justice, that Morrison, who confided in Jordan, should sustain the loss resulting from his insolvency than that Smith, or the complainants who purchased from him, should do so.

We are therefore of opinion that the circuit court was correct in decreeing Morrison to convey to the complainants; but that it was erroneous to subject them to pay to Morrison the money which he had paid to Hickey.

The decree must be reversed and the cause be remanded for a decree to be entered in conformity to the foregoing opinion. Morrison must pay the costs of both writs of error.

CUMMINS v. KENNEDY.

[3 LITTELL 118.]

CONTRACTS MADE BY EXECUTORS or administrators, although in fulfillment of executory contracts made by the decedent are not within the act of 1819, limiting the time of bringing suits against executors or administrators.

A COVENANT OF GENERAL WARRANTY passes in a deed of conveyance without warranty so as to enable the second grantee to maintain an action for the breach of the covenant against the original grantor.

BREACH OF COVENANT OF WARRANTY.—Where, at the time of a conveyance with warranty, the land was in the possession of adverse claimants, a recovery by them in an action of ejectment by the grantee will be a breach of the warranty.

IDEM—DAMAGES.—The value of the land at the time of the conveyance, with interest and costs, is the measure of damages for the breach of a covenant of warranty.

THE PRICE ACTUALLY PAID, although paid before the execution of the deed when the land may have risen in value, is the best evidence of its value.

UPON AN EXCHANGE OF LANDS, the value of the tract conveyed, and not that of the tract received, is the criterion of damages.

ERROR from a judgment on the general court. The opinion states the case.

Hardin, for the plaintiff in error.

Bibb, *contra*.

By COURT. Charles Cummins and William Kennedy, on the twenty-fifth of April, 1783, agreed to exchange lands. Cummins bound himself to convey to Kennedy four hundred acres of land in the then district of Kentucky, in the county of Lincoln on the waters of Harrod's creek; and Kennedy bound himself to convey to Cummins eight hundred acres of land of equal quality on the waters of Licking, on the south side of the stream. Cummings obtained by virtue of his pre-emption warrant, only two hundred and forty-eight acres and one quarter of land, instead of the four hundred acres contemplated by his contract. This first named quantity was patented in his name, on the thirtieth of May, 1785. In compliance with so much of his contract with Kennedy, Cummins, on the thirteenth of November, 1802, conveyed the said two hundred and forty-eight and one quarter acres to James Kennedy and Benjamin Beall, the former the son and devisee, and the latter the son-in-law, having married the daughter and remaining devisee of William Kennedy, who, in the meantime, had departed this life. James Kennedy and Beall were also the administrators of William

Kennedy, with his will annexed; which will gave power to his executors, who did not act, to sell lands or convey them in discharge of all his previous contracts, together with other powers over his real estate. On the same thirteenth of November, 1802, the said James Kennedy and Benjamin Beall conveyed, in discharge of so much of their testator's contract of exchange, four hundred and ninety-six and one half acres, in the county of Bourbon, on the south side of Main Licking, patented in the name of William Kennedy, on the tenth day of May, 1787, binding themselves to warrant and defend the said tract against all and every person or persons, so far as the assets of the said William Kennedy should extend. This latter tract the said Charles Cummins, by deed dated the fourteenth of June, 1811, conveyed to Robert E. Cummins the plaintiff in error, expressing the consideration of five hundred dollars, and containing a clause warranting the land against himself and his heirs, and all persons claiming under him or them, and the said Robert brought this action in the court below, in covenant, against James Kennedy, the surviving grantor of the deed to Charles Cummins, assigning a breach of warranty of the deed of said James Kennedy and Beall, which conveyed the tract in Bourbon.

On the trial of the cause the question presented itself, what was the proper criterion of damages recoverable. The plaintiff in that court contended that the value of two hundred and forty-eight and a quarter acres of land in Lincoln, on the thirteenth of November, 1802, the day when conveyances were exchanged, with interest and costs of eviction, was the proper measure of damages; or if that was not the proper measure, that the value of four hundred and ninety-six and a half acres in Bourbon, described in the deed declared on, at the date of the conveyance, was the proper measure, including its interest and costs. The defendant below, on the contrary, contended, that the value of the two hundred and forty-eight and a quarter acres in Lincoln, on the twenty-fifth of April, 1783, the day when the bargain for the exchange was first made, with its interest and costs, or the value of the four hundred and ninety-six and a half acres in Bourbon, on the same day, with its interest and costs, was the proper criterion.

The court reserved these questions, and the jury, by consent, found conditional verdicts, subject to the opinion of the court on the proper measure of damages. The jury, accordingly, found for the plaintiff below, and assessed the value of both tracts exchanged, on the twenty-fifth of April, 1783, with

interest, etc., to be one thousand and twenty-seven dollars and sixty-two and a half cents; but if the two hundred and forty-eight and a quarter acres in Lincoln, on the thirteenth of November, 1802, with interest, was the proper measure, they assessed the damages to five thousand three hundred and fifty-eight dollars and fifty-three and a half cents. They also assessed the value of the four hundred and ninety-six and a half acres in Bourbon, on the said last-named day, with its interest, to be three thousand five hundred and twenty-nine dollars and twenty-five cents. The court, after time for deliberation, gave judgment for the smallest sum, to wit: for the value of the land given in exchange by Cummins, on the twenty-fifth of April, 1783. To reverse this judgment and obtain judgment for one of the other sums found by the conditional verdict, Cummins, the plaintiff below, has prosecuted this writ of error. His right to a larger amount is resisted here, not only on the ground that the measure of damages allowed is proper, if he is entitled to any, but also that the record shows, by questions raised in his favor and ruled against him, that the plaintiff is entitled to nothing, or, at all events, not so great a recovery as he has already obtained. It will, therefore, be proper for us to investigate these previous questions; for if the plaintiff has gotten a judgment for something when he was entitled to less, or to nothing, he ought not to be allowed to complain; and if he is wronged by the judgment, and it must for that cause be reversed, it is the settled rule of this court to go back to the point where the first error occurred and there commence the correction.

1. The first of these preliminary questions relied upon arises out of a plea of the defendant, which was overruled on demurrer. This plea alleged that this suit was founded and brought on account of a contract of the testator, William Kennedy, and that it had been more than five years since he, the defendant, qualified as administrator with the will annexed upon the estate of said decedent; and that it had been five years since the cause of action accrued to the plaintiff; and that he, said administrator, before the commencement of this suit, "had distributed all the estate of said decedent, which had come to his hands, according to law, and had settled his accounts with the proper court." The design of this plea must have been to rely on the fifth section of an act passed February 9, 1819 (1 Dig. L. K. 537), limiting the time of bringing suits against executors and administrators. But this act expressly

confines itself to suits brought on contracts made by the testator or intestate. This contract, although it arose out of an executory contract made by the decedent, yet is made the contract of the administrator himself by his own act. He executed the conveyance and personally and individually bound himself in a clause of warranty, as far as the assets of his testator extended. It would then have no force against the distributees as such. It is a covenant at its creation, subject to no limitation by statute; and to give the act in question such a construction as to bear upon it, would virtually annul the contract of the administrator and change its obligations. Such contracts are not within either the letter or spirit of the act, and the court below did right in overruling the plea. The remaining questions which were made in the court below, contesting the plaintiff's right to a recovery, arise out of the motions to exclude the whole evidence, or to instruct the jury as in a case of a nonsuit.

2. According to principles heretofore recognized in this court, a remote grantee, in the case of eviction, has a right, by virtue of the several transfers or deeds, to commence suit against the first warrantor, his warranty being a covenant which runs with the land, and the right of action in case of a breach is held by the remote grantee. In this situation stood Robert E. Cummins, the now plaintiff. But as the conveyance to him from Charles Cummins does not contain a clause of general warranty but only a special clause, warranting against the said Charles and his heirs, and also recites a small consideration of only five hundred dollars, it may be contended that he has no right to recover, or at all events, only his purchase-money, with its interest; and these questions were involved in the points made for the defendant.

On the first of these questions, to wit, the lack of a clause of general warranty between Charles and Robert E. Cummins, it does not thence follow that on a breach of the warranty at the common law, Robert E. Cummins, the plaintiff, could not, when impleaded for the land, have vouched the first warrantor, or have brought his writ of *warrantia chartae*. The rule is that all persons named in the deed, such as heirs and assigns, could vouch or bring the writ, and in some cases even where not named; and generally, all privies in estate had the like remedy. The deed of the defendant in this instance warranted the land "to him, his heirs and assigns;" and it was not necessary that the grantee should bind himself in a like warranty to constitute

Robert E. Cummins an assignee. The deed contains no stipulation against his standing in that capacity, and passes the estate as completely as if a general warranty was annexed; and therefore he may have his action of covenant which we have adopted since vouchers are taken away, and have applied to cases which could be relieved by the ancient remedy. Many analogous cases to the present are found in the authorities relative to the ancient remedy. For instance, if the father be enfeoffed with warranty to him and his heirs, and he enfeoff his eldest son with warranty, and dieth, the law gives the son the advantage of the warranty made to his father, although by the act of law the warranty between the father and son is extinct. Again, if a man makes a feoffment in fee, with warranty, to him, his heirs and assigns, by deed, and the feoffee enfeoffeth another by parol, the second feoffee shall vouch or have a *warrantia chartæ*, as assignee, although he has no deed of the assignment; because the deed, comprehending the warranty, doth extend to the assignee of the land, and he is a sufficient assignee, though he hath no deed: 1 Inst. 384 b., 385 b.; Bac. Abr. tit. Warranty, letter N. This latter case is more strong than the present, and fully justifies the right of the present plaintiff, as assignee of the covenant, to recover of the defendant, and shows that he has the right to take advantage of the first warranty, notwithstanding his immediate deed contains no similar clause.

As to a less consideration being expressed in his deed, less need be said. The parties must be presumed to have known the law, and he gave the sum, risking the holding of the land and his recourse on the defendant, if he failed to hold it. The sum paid by him does not affect the extent of the covenant of the defendant. He could be bound for no more, by any larger consideration passing between Charles and Robert E. Cummins, nor could his liability be diminished by a less consideration. The main question is, has Robert E. Cummins, the plaintiff, a right to stand in the place of Charles, and take advantage of the covenant? This we have already answered in the affirmative, and it follows that he has the legal right to make the defendant responsible to the extent of his undertaking. The next and most material objection relied on, to the recovery of the plaintiff, is that he has shown no legal eviction of the land conveyed to him, and of course there is no breach of the covenant.

3. The eviction, or rather that which the plaintiff relies on as

a substitute for an eviction, is the following: The land conveyed to him, to wit, the four hundred and ninety-six and one half acres in Bourbon, was taken possession of by sundry persons, against whom, relying upon his title, he brought an ejectment in the Bourbon circuit court. These settlers set up against him and proved a grant for the whole land, elder in date than that of William Kennedy, conveyed by the defendant and Beall, as his representatives, and thereby defeated his recovery. This record of the Bourbon circuit court he has set out in his declaration, and alleged a paramount and elder title as the cause of his defeat; and he exhibited that record in evidence, and proved the actual existence of that elder title on the ground, on this trial, and relies on it as equivalent to an eviction by title paramount; and the question is, can this warrant his recovery? In solving this question we cannot expect much light from ancient authorities. According to them, he who was impleaded must vouch his warrantor, and at the close of the transaction, if he lost, recover other lands of equal value against his warrantor, or lose his recourse. According to our rules, if he has possession, and another brings his action and evicts him, he sues on his covenant; and on proving that he gave notice of the action of eviction against him to his warrantor, so as to enable him to defend it, or that the recovery was had against him by title paramount, so that neither he nor his warrantor could have defended successfully, this *prima facie* sustains the breach of the covenant, and entitles him to recover; and more has not been required, where the warrantee has stood as a defendant or tenant in the action of eviction.

It is difficult to assign any good reason why the same proof should not maintain the breach, where he had the attitude of a plaintiff or demandant. In the first case, he has entered and is ousted by title paramount; in the latter, he is prevented from entering and enjoying by a title of the same character. In one case, that title may drive him from the land, so soon as he is on it; in the other, he is precluded from the least enjoyment or even entering there. The effect is the same, or worse, in the latter case than the former, and is produced by the same cause. Whether the settlers on this land were there before the date of either of the deeds, does not appear in the cause; but if they were there, and the land was held adversely to Kennedy's representatives, it was, according to the statutes of this country, as expounded by the supreme court of the United States and this court, the subject of sale and conveyance; and

as in that situation it could be conveyed and warranted, the warrantors ought to be subject to the same remedy, on proof of their title being defeated by a paramount title, as they would be in case of the paramount title evicting their grantees; otherwise conveyances of land with warranty, held by an adverse possession under an adverse claim, could never be broken. The law would allow such conveyances and admit the validity of the contract, and yet be ignorant of any remedy to enforce it, because the grantee could never enter. Such an absurdity ought not to be permitted.

We are aware that the supreme court of New York has decided that a legal eviction is necessary to support a breach of warranty: See *Greenby v. Wilcocks*, 2 Johns. 1 [3 Am. Dec. 379]; *Folliard v. Wallace*, 2 Id. 395; *Kent v. Welch*, 7 Id. 258 [5 Am. Dec. 266]; *Sedgwick v. Hallenback*, 7 Id. 375. This doctrine we are not disposed to contest; and it ought, perhaps, to apply to all cases where the possession was actually delivered with the deed. But that court has never decided that a defeat in pursuing the possession by legal process, where the parties are reversed, would not be an equivalent. If, however, such should be the decision in a country where conveyances of land held by an adverse possession are void, the rule ought to be different in this country, where such conveyances are permissible and valid. We, therefore, conceive that the plaintiff in this case has shown a right to recover, to an amount equal to his judgment, and that his right to enlarge it is not impaired by the objections of the defendant made against it. The inquiry then remains, whether the court adopted the proper criterion in rendering the judgment on the conditional verdict?

4. The general rule, settled by a current of authorities is, that as the conveyance completes the sale, the value of the land conveyed, at the date of the conveyance, with interest and costs, forms the criterion of damages; and, also, that the price stipulated is the best evidence of that value. And where the parties have shown that price in the conveyance, it would, perhaps, be going too far to say that they ought to be concluded by it. Hence, if the consideration was paid long before the date of the deed, still, if it is expressed, it would fix the criterion, though the land when conveyed, had greatly risen in value. In this case, however, the parties have shown what constituted the consideration; but still its then value is uncertain, because it consisted in land, the price of which was not fixed. It is not necessary now to say that in every case, parties, where the deed

did not fix the price, should be confined to its date, and could in no case travel back and show that the consideration had passed long before, and of course was of less value; for in this case there are circumstances which show that the warranty ought to be measured by the general rule, notwithstanding the contract was made in 1783, with the testator of the defendant. The contract is modified, and does not contain as much, when completed by conveyance, as it did in 1783; and the parties have not only included the land in Lincoln, but also expressed one dollar as additional consideration. This may be supposed to be, and in fact may be, merely nominal; but in all controversies between the same parties, it must be treated as real. Hence, such a consideration alone will support a deed; but if it can be impeached, and shown to be fictitious, the deed would fall, without a consideration to support it. We then see nothing to distinguish this case from the case of *Marshall's heirs v. McConnell's heirs*, decided at the spring term, 1822, which we conceive to be so analogous as to govern this. Still, however, the question recurs, which of the tracts at the date of the conveyances, ought to be taken? That in Lincoln, or the one in Bourbon? No doubt the parties, at the date, rated the two at an equal value; and if that value was known, we should not hesitate to adopt it. But that is unknown, and all we have now is, the assessment of each tract by a jury, founded on the memory and opinion of witnesses, as to the value of the respective tracts at that day; and this has determined the tract in Lincoln to be then most valuable. The value of the thing conveyed by the deed of warranty which is broken, is, however, still the proper measure. Hence, the tract in Bourbon must be taken. And the assessment of the tract in Bourbon, by a jury now, without regard to what the parties then estimated it, cannot aid in fixing the value of the tract in Bourbon. It may prove that the parties then estimated the tract in Lincoln too low, or that in Bourbon too high; but that will give no additional claim to the plaintiff. He must be satisfied with the value of what he lost.

The only pretext for taking the value of the Lincoln tract must be afforded by applying the doctrines regulating an exchange, technically so called, in which the party evicted gains or recovers the tract which he gave in exchange to remunerate him. The parties in this case, however, by their own conveyances, have converted this transaction into a case of bargain and sale; and of course the warranty must have the same meaning and effect as such warranties in other cases. The court

below, then, erred in taking the value in 1783, and ought to have rendered the judgment for the sum of three thousand five hundred and twenty-nine dollars and twenty-five cents, the value of the tract in Bourbon, on the thirteenth of November, 1802, when the conveyance was actually made.

The judgment must, therefore, be reversed, with costs, and directions given them to enter judgment according to this opinion.

BREACH OF COVENANT OF WARRANTY.—"The true rule deducible from the recent cases is that the covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title. Nor is it necessary that the paramount title should have been established by judgment before the covenantee will be authorized to surrender the possession. It is enough that the true owner asserts his title and demands the possession. If it is his right to have possession, it certainly is the duty of the covenantee to surrender it to him. The covenant is for quiet possession, and against a rightful eviction. To constitute a breach of this covenant, it cannot be required that the covenantee should maintain a wrongful possession, and subject himself to be treated as a trespasser. The object of a suit by the true owner would be to compel the covenantee to do that which he ought to have done without suit. It could not have been contemplated by the parties to the covenant that the covenantee should refuse to do what the law enjoins upon him as a duty. Nor can we perceive how the covenantor would be benefited by an eviction under a judgment. It was never considered necessary that the covenantor should have notice of the pendency of the suit. The judgment might be obtained without any real trial of the merits of the title; and besides, in the action upon the covenant it is incumbent upon the plaintiff to establish that the title to which he has submitted is a paramount title.

"Although there must be an eviction, it is not necessary that there should be an actual dispossession of the grantee. If the paramount title is so asserted that he must yield to it, or go out, the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach. He then no longer claims under his former title. So far as that title is concerned, he has been evicted, and is in under the paramount title: *Sugden on Vendors*, 745 and note; *Loomis v. Bedell*, 11 N. H. 74; *Hamilton v. Cutts*, 4 Mass. 349 [3 Am. Dec. 222]; *Turner v. Goodrich*, 26 Vt. 709; *Sprague v. Baker*, 17 Mass. 586; *Rawle on Covenants*, 278 *et seq.*, and cases cited; *Noonan v. Lee*, 2 Black, 507; *Funk v. Crennell*, 5 Clark, Iowa, 86; *Brady v. Spruck*, 27 Ill. 478; *Stewart v. Drake*, 4 Halst. 139-275." Per Judge Temple, delivering the opinion of the court in *McGary v. Hastings*, 39 Cal. 360.

The courts of a majority of the states decide in harmony with this opinion, that an actual dispossession is not necessary to constitute a breach of the covenant of warranty; that an eviction is complete when a constructive dispossession has taken place. That is where, by reason of the asserting of a paramount, outstanding title, the covenantee, in order to retain possession, is obliged to recognize such title and to buy it in: *Kenney v. Norton*, 10 Heisk. 384; *Kansas etc. R. R. v. Dunmeyer*, 19 Kan. 539; *Furnas v. Durgin*, 110 Mass. 509; *Kellog v. Platt*, 33 N. J. L. (4 Vroom) 328, where the cases

are extensively reviewed. And it has been held that a sale under an execution upon an attachment levied prior to the conveyance, is equivalent to an eviction, and entitles the grantee to an action on his covenant, although he became himself the purchaser at the sale, and remains in possession by virtue of the title acquired by such purchase: *Whitney v. Dinemas*, 6 Cash. 124; *Brown v. Dickinson*, 12 Pa. St. 372; *Rawle on Covenants*, 284.

Notwithstanding the general current of the authorities, in a few instances the doctrine of constructive dispossession is not adopted. In *Dyer v. Britton*, 53 Miss. 270, the law of Mississippi is stated to be, that in order to sustain an action on the covenant of general warranty, there must be either an actual eviction by judicial process, or a surrender of possession to a valid subsisting paramount legal title, asserted against the covenantee, or that there must be a holding of the grantee out of possession by such title, so that he could not enter. And reference is made to *Dennis v. Heath*, 11 S. & M. 206, 218; *Witty v. Hightower*, 12 Id. 478, 481; *Burrus v. Wilkinson*, 31 Miss. 537. The court place their decision in *Dyer v. Britton* on the ground of earlier cases similarly adjudged, but remark that were the question *res integra* with them, they should adopt the reasoning and conclusions of that line of decisions which have admitted constructive or equitable evictions as of equal import with an actual ouster, in certain circumstances. Apparently laying down the same principle as *Dyer v. Britton* is *Jones v. Warner*, 81 Ill. 346.

THE RULE OF DAMAGES for a breach of the covenant of warranty is to allow the consideration paid and interest, together with the costs expended in the defense of the grantee's title: *Horsford v. Wright*, 1 Am. Dec. 8, and note. The value of the improvements cannot be recovered in an action for the breach of the covenant: *Statts v. Van Eyck*, 2 Id. 254. This rule, regarding improvements can seldom work substantial justice between the parties, and seems to be founded in expediency rather than in abstract justice. It is, however, very generally recognized: *Sedgwick on Damages*, sec. 165.

JOHNSTON v. DUNCAN.

[S LITTELL, 163.]

EXECUTOR DE SON TORT, is one who takes possession of the goods of a decedent without color of title; otherwise if there is color of title.

APPEAL from the circuit court. The opinion states the case.

Monroe, for the appellant.

Breckenridge, *contra*.

By COURT. This was an action of debt, brought in the circuit court by Duncan, to recover the amount of an obligation given to him by Reuben Johnston, deceased. The action was brought against Thomas Johnston, as executor of the estate of Reuben Johnston, deceased, and the declaration pursues the writ in that respect. Johnston appeared and filed a plea, denying that he was executor of the decedent, Reuben Johnston.

To this plea Duncan replied, although inartificially, in substance traversing the truth of the plea. The issue was tried, and a verdict found for Duncan; and after the motion of Johnston for a new trial was overruled, judgment was rendered in conformity to the verdict against Johnston.

The assignment of errors questions the correctness of decisions given by the court in the progress of the trial, as well as that given in refusing to award a new trial. It was proved that Thomas Johnston, senior, the father of both Reuben Johnston, deceased, and Thomas Johnston, the defendant in the court below, was the rightful owner of a negro boy; and whilst the boy was but a few years old he gave him to his son, Reuben, in his life-time; that Reuben received from his father the possession of the negro boy, and exercised ownership over him for several years previous to his death; that some time previous to the death of Reuben he and his father went to live with the defendant, Thomas, and that both of them, together with the negro boy, continued with the defendant from that time to the death of Reuben; and that immediately upon Reuben's decease, the defendant took possession of the negro to his own use, and still holds him in his possession. It was also proved by the introduction of a bill of sale from the father to the defendant, that after the death of Reuben, the father, in consideration of six hundred dollars, sold and delivered the possession of the boy to the defendant, covenanting in the bill of sale that he had good right to sell and convey the negro boy. There was no evidence of any will having been made by Reuben Johnston, or of any administration having been granted by the competent authority on his estate, since his decease. It was upon the preceding evidence, in substance given to the jury, that Duncan, the plaintiff in the court below, rested his case; and the main question attempted to be made in the progress of the trial, and on the application for a new trial, and which it now becomes necessary for this court to decide, is as to the competency of the evidence to charge the defendant, as executor of his own wrong, with the payment of the plaintiff Duncan's demand.

It is proper to premise that there exists a degree of obscurity in the evidence, whether the negro was taken into possession of the defendant to his own use before or after the bill of sale was given by the father. From the statement made in the bill of exceptions, however, the evidence is of a character from which the jury might infer the possession to have been taken

before the father gave the bill of sale; and we shall, in considering the question of law, assume the fact to be so. Thus considering the fact, we can have no hesitation in pronouncing the defendant to be chargeable as an executor *de son tort*; for by taking the possession of the negro to his own use, without color of title, the defendant took upon himself to do that which was proper to be done by an executor or administrator only; and as the law is well settled that to do such acts as belong to the office of an executor or administrator, without any authority from the deceased or the tribunal authorized to grant administration, constitutes the perpetrator of the acts of an executor of his own wrong.

We should not have entertained the opinion that the defendant was chargeable if the possession of the boy had never been taken by the defendant until he received the bill of sale from the father; for that bill of sale conferred color of title on the defendant, and it is said to take any of the goods of the deceased into possession under color of title, is not such an intermeddling with the estate as constitutes an executor of his own wrong. Nor will the receiving of goods under a purchase or gift from another who has taken the goods of the deceased, make the receiver chargeable as an executor of his own wrong, though the person taking and from whom received, will be chargeable in that character: See Shep. Touch. 488.

The judgment must be affirmed with costs and damages.

THOMAS v. WHITE.

[3 LITTELL, 177.]

THE ADMINISTRATOR'S ASSENT to a suit at law, by the heir, for the recovery of a slave, is necessary. Where the assent is not given, the heir may bring a suit in chancery against the holder of the slave and the administrator.

TIME DOES NOT RUN against a *cestui que trust* either at law or in equity.

DIVISION OF STATE.—LETTERS OF ADMINISTRATION GRANTED by Virginia prior to the separation of Kentucky, will entitle the administrator to maintain an action in the latter state as though no separation had taken place; it is a right secured by the constitution.

TIME BEGINS TO RUN when the right of action accrues, not when a person, ignorant of his rights, comes to a knowledge of them.

THE EXCEPTION IN CHANCERY is where the rights are purely equitable.

ADMINISTRATOR IS NOT LIABLE FOR NEGLECTING TO SUE unless he acted with bad faith, or was guilty of willful default or gross negligence.

APPEAL from the circuit court. The opinion states the case.

Benjamin, Hardin and Denny, for the appellant.

Sharp, Attorney-general, and Littell, contra.

By Court. George Thomas filed this bill, alleging that his grandfather, Daniel White, had made his will in Virginia, and devised to his son, William White, the only child then living of his slave Betty, and the next child that should be born, to his mother, Mary White, the slave being then pregnant, and that she had a child shortly afterwards, which was called Nursey; that said Mary White intermarried with William Thomas, and that when they went to housekeeping, they took with them said slave Nursey, and were in possession of her for some time; that William Thomas, his father, died, leaving the complainant his only issue, and after his death his mother returned to live with her mother, and the slave along with her, both still residing together, until they removed to Kentucky; that William White, a brother of his mother, administered on the estate of said William Thomas, there being considerable personal estate; but never took any notice of the slave Nursey, as belonging to the estate, and that she continued with his mother until she married Nathaniel Floyd, who had still held Nursey, who has now had numerous children, some of which Floyd has sold "to persons acquainted with the claim." By the original and amended bills, he makes Floyd and his wife, William White, administrator of his father, and the purchasers of the different children of Nursey, defendants; and prays a settlement of the personal estate with the administrator, and a recovery of Nursey and her children, with an account of her hire.

The administrator answered, setting forth the personal estate as shown by the inventory and sale; and alleges that the complainant lived with Floyd, and was kept by him, and that Floyd has the personal estate in his hands, or some of it; that after the complainant came of age, he, the administrator, at the pressing solicitations of the complainant and Floyd, acted as an arbitrator between them, and settled the accounts of the estate, and made an award, to which the complainant agreed in writing, and the estate was settled accordingly. Floyd in his answer denies the right of the complainant's father to, or that he ever had possession of, Nursey, and contends that she was since given to his wife, the mother of the complainant. He insists that a court of equity will not take jurisdiction of the

case; and relies on the award set up by the administrator and the statute of limitations. The court below dismissed the bill as to all the defendants, and the propriety of that decree is the question now presented for our decision.

We have no doubt that as to the administrator, so far as the bill attempted to charge him with the personal estate, it was properly dismissed. After the complainant came of age, it appears that the defendant, Floyd, his step-father, claimed a part of the personal estate, being entitled thereto in right of his wife, and another share for the maintenance and education of the complainant; and these matters the parties agreed to leave to the administrator, who, by a written award, decided that the balance of the personal estate should go to Floyd, for schooling and raising the complainant; and that he, the complainant, should have no right thereto; and that the slaves, omitting entirely the family now in contest, should go to the complainant, except one old negro woman which was assigned to Floyd forever, in settlement of his claim, and Floyd was also to receive twenty dollars more; and "that henceforward all matters of dispute relative to, or in any manner of, about or concerning the said estate, between the said complainant and Floyd, and their heirs, executors, administrators, and assigns, to cease and determine; and all claim of every sort, description, or kind whatsoever, of either on the other, either in law or chancery, relative to the said estate, when the award should be agreed to and signed by both parties, should be forever barred." Afterwards both the complainant and Floyd signed and sealed the following agreement, at the close of the award: "Having considered the foregoing award, acknowledge that we are therewith satisfied, perfectly and well satisfied; wherefore, we hereby agree to, and admit the same to be binding on us, our heirs, executors and administrators."

After such an award and ratification thereof, there can be no doubt that the right of Floyd to the balance of the personal estate, with whom the administrator accordingly settled it, was complete, unless the transaction could be impeached by mistake or fraud, which is not attempted. It is true Floyd or the administrator had not the right of expending the principal of that estate for the maintenance and education of the complainant; but as the balance was small it could not be more than an adequate compensation, which the complainant, then of mature age, had a right to give, and which he did give by ratifying the award. On this claim, then, he is entitled to no

relief. But the claim to Nursey and her family rests upon different grounds. It is true this award is relied on as a bar to the claim for her; but however broad the expression used both in the award and the agreement may be, it is evident it cannot include these slaves. The estate settled and recited is the personal estate in the hands of the administrator, and an entirely different family of slaves specially named in the award. The matters of dispute which were to cease were "concerning said estate;" and the claims which were to be "forever barred" in law and equity, were those "relative to said estate;" that is the estate then settled by the arbitrator and recited in his award, which was distinct from that now claimed. Add to this, that the administrator never did take Nursey and her family into his possession as administrator, or treat her as belonging to the estate, and he proves in his deposition taken in the cause, that Nursey and family were not within the terms of the submission, nor was the claim to them at all brought into that controversy which the award decided. We, therefore, conceive that neither the award nor ratification determines anything with regard to her title, and that the bar so strongly relied on, arising from that transaction, cannot prevail.

1. Nor can we sustain the objection taken to jurisdiction of a court of equity over this controversy. The heir cannot support an action at law to recover a slave or personal chattel belonging to his ancestor, without the assent of the executor or administrator: *Woodward's heirs v. Threlkeld*, 1 Marsh. 10. But if the administrator will not sue, it does not follow that the heir must lose the chattel, if his title is good, and that a court of equity, as there is no remedy at law, will not interpose and give the appropriate redress. In this case the administrator would not assent for he never treated the slaves as part of the estate, nor would he claim them as such. Of course, the complainant could not recover at law; and for this reason, his application to enforce his claim, to a court of chancery, was proper, wherein he has made the administrator and holder of the estate both parties; so that if he manifested title, the court could supply that assent, which the administrator never would give, and decree to him the slaves at once. The question, then, must rest on other points of defense which we must investigate. We have, no doubt, from the evidence, that Nursey, the mother of the other slaves, was the second child of Betty, contemplated by the devisee in the will of Daniel White, grandfather of the complainant and, and if his father ever acquired title to the

slave, he must recover, unless he is barred. The will of Daniel White, touching the disposition of the slaves in controversy, reads thus: "Moreover, my will and desire is, for my well beloved wife to have the use of negro woman Bett, while she raises three children fit to be raised without the breast; then the said negro Bett to return to my son, Daniel White, and his heirs. Item, I give and bequeath to my son William White, one of the children before mentioned is now born, named Dina; and if he lives to have an heir, if not, to be sold and equally divided between his sister, Mary White, and brother, George White, which I had by my last wife. Item, I give and bequeath to my daughter, Mary White (now Mrs. Floyd), before mentioned, the next child my negro Bett raises; to be divided in the same manner as the before mentioned, if she dies without heir. Item, I give and bequeath to my son George White, the third child the said negro woman raises, to be divided among the survivor or survivors. Also my desire is, that my beloved wife shall keep the said three negroes, until the survivors or survivor comes to the age of twenty-one years."

2. So far as we are able to ascertain the meaning of this will, the testator designed that these three slaves should pass, one to each of his respective children, William, George, and Mary; and that by the word "heir," he must have meant lineal descendants or children, and not collateral heirs; for such collaterals appear, both from the will and other evidence to be numerous, he having had two wives; so that there was no probability of a lack of heirs of that character. He must, also, have intended that if one or two of these, his children, should die without children, the survivors or survivor should hold the slaves. The custody of these slaves was, however, granted to his wife, until these three legatees should each of them arrive at the age of twenty-one years. It is somewhat doubtful whether Mary, first the wife of Thomas, and now the wife of Floyd, at her first marriage, had arrived to the age of twenty-one years; but assuming the fact to be that she really had arrived to that age and that Thomas, father of the appellant, did, during the existence of the marriage relation, get into his possession the slave Nursey, in which case she became absolutely his, and that on his death the slave remained with the widow, the question presents itself, what will be the effect of the statute of limitations on the claim of the appellant?

The administrator administered in Virginia before the separation of this state from that. About two years afterwards, the

widow of Thomas, and mother of the appellant, removed to this state, leaving behind her the slave, Nursey, in the care of the administrator, as a friend, in order that she might be taken care of. The year following, the administrator came to this state, and brought Nursey along with him, and delivered her to the mother of the appellant, and both she and the administrator have resided here ever since. This possession of the administrator was not as administrator; for he had not had Nursey appraised or inserted in the inventory returned by him, as part of the estate of Thomas, the decedent; nor did he ever set up claim to, or treat her as belonging to, the estate of his intestate. This removal of the administrator took place not later than the year 1794. From that time, until within less than five whole years before this suit was commenced, the appellant was an infant. If this controversy was exclusively between the appellant and the administrator, there could then be no doubt that the statute would not be a bar to the claim set up. The right of the appellant is an equitable one, and the administrator must be, during this period, considered as his trustee; and it is a settled rule that the statute, either in equity or at law, cannot protect a trustee against the demands of the *cestui que trust*.

3. It is, however, clear that the legal right to the slave, if she belonged to the estate of the decedent, was vested in the administrator, and that he could, by any appropriate legal remedy, have recovered her from Mrs. Thomas, or from Floyd, after his intermarriage with Mrs. Thomas. Although she went into the possession of Mrs. Thomas by consent of the administrator, yet she did not hold the slave as bailee to the administrator, but as her own; therefore, there was not such amicable possession on the one hand as would have saved the statute from attaching, or such disability in the administrator as would bring him within any of the exceptions of the statute. The only obstacle which could be plausibly set up to his maintaining and prosecuting a suit as administrator, for the slave, is that as his letters of administration were granted in Virginia, he could not, on them, have maintained the suit in this state. We have an act of assembly now in force, which authorizes executors or administrators, constituted such in other states, to sustain actions here, under certain restrictions and regulations; but this act is of such modern date that it cannot affect this controversy. But whatever may have been the law in this state, anterior to this statute, with regard to executors and adminis-

trators, constituted such by the laws of other states, there could be no difficulty with respect to those who were legally constituted such by the laws of Virginia prior to the separation; for the constitution of Kentucky, then adopted, provided "that all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, should continue as if the said government had not been established." It would seem to follow from this provision that if this administrator could have sued here before the separation, he could have done it afterwards; and there was no real obstacle against a suit for the slaves, arising on this account. The result of all this is that the statute of limitations had really run out its necessary portion of time to complete the bar as between the administrator who held the legal of suit, and Floyd and his wife. The question then is, can the chancellor relieve from its effects?

4. It may be said that the administrator did not know his rights in this respect, and was not acquainted with the facts which showed that the negro belonged to the estate of his intestate. Let this be admitted, and still the bar must be complete in a court of law; for the act commences there, when the cause of action accrues, and not when the plaintiff, who was ignorant before, came to the knowledge of his rights. It is true that according to some decisions, a court of equity adopts a different rule, and especially in cases of fraud and perhaps in others where a party was wholly ignorant of, and had not the means of ascertaining his rights, that court may not permit the statute to attach until the discovery is made and these rights become manifest. This, however, must apply to cases where the rights of the party are purely equitable, and not to cases where the legal right, in whosoever hands it may be, is barred in a court of law. The chancellor, in such case ought not to relieve against the statute after it has become a bar at law, for it would be absurd to say that the legal claim could not be enforced at law, and yet that equity should sustain the controversy. However feeble then the statute may be in the mouth of the trustee, against his *cestui que trust*, it must have its appropriate effect in favor of a stranger, guilty of no fraud or concealment, as Floyd appears to be in this case, against the same *cestui que trust*; for if he has the advantage of the bar against the legal estate, he ought not to be stripped of it against an equity only. It follows, therefore, that the claim of the appellant against Floyd and those holding under him, for these slaves, was barred, and on this ground the bill, as to them, was properly dismissed.

5. The question then remains, has he any recourse against the administrator for this negligence in not taking in the slave as part of the estate; not keeping her when she was in his possession, and not prosecuting suit for her until the bar had elapsed? No doubt, an administrator or executor may be made responsible for such losses occasioned by negligence; but to charge him it is necessary that he should have acted with bad faith, or with some willful default or fraud, or gross negligence: See 4 Johns. Ch. 419. As to the fact that Thomas had the possession of this slave in his life-time, the administrator swears in his answer, and also in a deposition taken by the appellant himself, that he never did know that Thomas, his intestate, had held the possession of the slave; and from any testimony in the cause, it does not appear that he ever had such knowledge. And it is very probable, from the distance that he resided from the intestate, and the short period of time which Thomas held her, that he might remain ignorant of the fact. We have, however, no doubt that such was the fact. We do not take this, however, from the testimony of the old lady, who is the widow of the testator and mother of Mrs. Floyd, and who has given two depositions in the cause, in one of which she so flatly contradicts what she had stated in the other on this very point, that we can place no reliance on either. The testimony, however, of Mrs. Floyd, who was a competent witness against the administrator, and whose deposition he took himself, and caused to be read against the objection of the opposite party, is too explicit on this fact to leave room for doubt, notwithstanding other witnesses have proved facts conducing to negative the possession of Thomas; and one of them, adopting an adventurous mode of swearing, too common in family controversies like this, has sworn to a negative, to wit, that Thomas never had the possession of the slave. But when we admit this fact to be true, and that the consequence was that the slave really belonged to the proper estate of Thomas, as the administrator never knew the fact, he cannot be charged with such mal-conduct on this account as to render him responsible for the price of the slave. He must, however, have known of the will of his father, for he himself claimed and held rights under it; and from his connection with the family, he must have known that Nursey was the child, bequeathed by the will to his sister Mary, after she arrived at the age of twenty-one years, and in the meantime directed to remain with his mother. He also well knew of the marriage of Thomas, his intestate with his

sister. It may then be urged that by law, Mrs. Thomas had a vested right, under the will, to the slave, which, by the marriage, so vested in her husband that the right, on his death, would not survive to her, notwithstanding he never obtained possession of her, because the particular estate was not determined; and that his administrator was bound to know the law, and must be presumed to have known it, and, therefore, he is inexcusable for not asserting the claim, and thereby saving the slave. This is the strongest attitude in which the case can be placed against the administrator, supposing, as we have done, that he was ignorant of his intestate's possession.

It must be admitted to be a correct maxim, at least in a criminal case, that every intelligent man is presumed to know the law; and on no other principle could society well exist or be governed. We yet, however, well know that its principles are frequently so abstruse and hard to be ascertained, as to escape the ken of the most enlightened lawyers, and that they may frequently be convicted of palpable mistakes in dealing and practicing upon its principles, when it would be cruel and unjust to impute to them such gross negligence or impurity of motive as to make even them responsible for culpable neglect or fraudulent intention. If such as they ought to be excused for such blunders, much more ought a plain man, as this administrator appears to be, who never seems to have made the science of law his study, from being charged with having acted with bad faith, even if the law of this case with regard to the right of his intestate in this slave should turn out to be as before assumed. Whether as the title to this slave was vested in Mrs. Thomas, now Mrs. Floyd, before her marriage, subject to the particular estate reserved to her mother, it would so vest in her husband, on the marriage, as to descend at his death, to his representatives, or whether it would survive to the wife, is a question on which we do not now feel ourselves bound to express any decided opinion. We will, however, say, that it is one which, with regard to slave property, has never been directly settled by any solemn adjudication in this country. And the appellate court of Virginia, in the case of *Wallace v. Tuliafero*, 2 Call, 447, has decided, after elaborate argument and solemn deliberation, with some division among the members of that court, that even in a case where the right of the wife accrued during coverture, which is stronger than the present, the right survived to the wife. If the question is thus doubtful, or rather, has been thus decided against the appellant, by a tribu-

nal of such high authority in the state where this right first accrued, if it accrued at all, surely the administrator may be acquitted of mal-administration, in neglecting to contend for it.

Add to this, that it is in proof that a strong belief existed in the family that this slave did not pass by the will, because she was not born at the time of making the will, owing to the advice of a lawyer in that country to that effect. And although we have come to a different conclusion, yet it is a question not free from doubt or difficulty, increased by the barrenness of authority.

Upon the whole, then, we conceive that the appellant has not made out such a case of mal-conduct against the administrator as to subject him to the value of these slaves; and the appellant, admitting the law to have been once in his favor, has met with what is not unusual—a loss of property by not seeking it in time, or because the title thereto was not well understood.

The decree must, therefore, be affirmed with costs.

EXECUTOR'S LIABILITY FOR NEGLIGENCE.—If an executor or administrator, by his delay in commencing an action, has enabled the debtor of his decedent to protect himself by a plea of the statute of limitations, this amounts to a *devastavit*: 3 Williams on Ex. 1805. Yet the mere delay will not render the executor or administrator liable for loss where he acted in good faith. He is not bound to resort to legal measures for the collection of debts due the estate, if such course would be ineffectual: *Sanborn v. Goodhue*, 28 N. H. 48; *Bowen v. Montgomery*, 48 Ala. 353; *Cooke v. Cooke*, 29 Md. 538; *Succession of Pool*, 14 La. An. 677; *Mitchell v. Trotter*, 7 Gratt. 136; *Nelson v. Page*, Id. 160. But to relieve the personal representative from responsibility on the ground that the debt could not be recovered, it is necessary for him to show that fact: *Stiles v. Guy*, 16 Sim. 230. In general, for the exercise of a sound discretion with regard to collecting the assets of the estate, the executor will not be made liable. "All that a court of equity requires from trustees is common skill, common prudence, and common caution. Executors, administrators, or guardians are not liable beyond what they actually receive, unless in case of gross negligence; for when they act as others do with their own goods, and with good faith, and are not guilty of gross negligence, they are not liable: *Calhoun's Estate*, 6 Watts, 185; *Crist v. Brindle*, 2 Rawle, 122; *Eyster's appeal*, 3 Barr, 288." *Per* Sharwood, J., delivering the opinion of the court in *Neff's appeal*, 57 Pa. St. 91, 96. In *Schultz v. Pulver*, 11 Wend. 361, an executor was held liable for neglecting for several years to realize upon notes which might have been collected; and it was further decided that where the assets are not in the state where the administration was granted, reasonable diligence should be exerted to take out letters in the sister state, and proceed to the recovery of the assets there.

The general rule for the guidance of executors in the administration of their trust is clearly and succinctly stated by Judge Stanard, in delivering the opinion of the court in *Kee v. Kee*, 2 Gratt. 116, 128, and approved in *Southall v. Taylor*, 14 Id. 281: "The duties of the executor are to be per-

formed under the obligations of sound judgment, acting on those considerations of worldly prudence which affect the safety of the pecuniary interests confided to his care. When such judgment, so governed, is fairly exercised (and tested by the facts existing, and known at the time it is exercised), is such as would probably be formed by a judicious man managing his affairs with reference to considerations of mere worldly prudence, the executor is justified in acting on such judgment, and so acting is not responsible for alleged losses resulting from his conduct."

For gross neglect in failing to collect a debt due the estate, the executor will be personally liable: *Schultz v. Pulver*, 3 Paige, 182; S. C., 11 Wend. 363; *Scarborough v. Watkins*, 9 B. Mon. 540; *Smith v. Hurd*, 16 Miss. 682; *Holcomb v. Holcomb*, 11 N. J. Eq. (3 Stock.) 281; *Charlton's Estate*, 34 Pa. St. 473; *Shaffer's Estate*, 46 Id. 131; *Jennings v. Weeks*, 1 Rice (S. C.), 453; *Southall v. Taylor*, 14 Gratt. 281; *Tuggle v. Gilbert*, 1 Dur. 340.

DAVIS v. SHREVE.

[3 LITTELL, 280.]

PAYMENT OF MONEY TO A THIRD PERSON must be proved by the examination of witnesses. The receipts of such person made after the cause of action against the defendant accrued, are inadmissible.

ERROR to the circuit court. The opinion states the case.

Breckenridge, for the plaintiff in error.

Nicholas, contra.

By COURT. This writ of error is prosecuted by Davis to a judgment recovered against him in an action of trover, and conversion brought by Shreve and Coombs. The property alleged to have been converted by Davis, was taken by him and sold under executions which issued in favor of others, against the estate of Charles Edwards, and which were put into the hands of Davis, a deputy sheriff, for collection, and the right to the property is asserted by Shreve and Coombs under a deed of trust which had been executed to them for the property by Edwards, before the executions were delivered to Davis. On the trial in the circuit court, the deed of trust was read in evidence, and purports to have been given as collateral security to secure Shreve and Coombs in the repayment of from two hundred dollars to five hundred dollars, which was agreed by them to be thereafter advanced to Edwards. The deed of trust bears date the sixth of April, 1818; and attached thereto are various receipts subsequent in date to the deed of trust, purporting to have been given by Edwards for different sums received from Shreve and Coombs. The signatures of these receipts were

proved to be the handwriting of Edwards, and all prior in date to the emanation of the executions under which Davis seized the property; but all of the receipts were admitted to have been given since.

Upon these facts, the court were applied to by the counsel of Davis to instruct the jury that if they found the receipts of Edwards to Shreve and Coombs were given and attached to the deed of trust after the property had been taken in execution by the sheriff, they were illegal and incompetent evidence, and ought not to be regarded by them; but the court overruled the motion, and refused to give the instructions. Assuming the facts to be true upon which the motion for instructions was hypothecated, the principle is not perceived on which the competency of the receipts, as evidence, can be maintained. The receipts amount to nothing more than the acknowledgment of Edwards made after the property was taken by Davis, and surely such acknowledgments, according to the rules of evidence, cannot be brought in aid of the claim asserted by Shreve and Coombs for compensation. If it were deemed material for the interest of Shreve and Coombs to prove the payment of the money agreed to be advanced to Edwards, it should have been done by the introduction of a witness in court, where there might have been a cross-examination, and not by the receipts admitted to be given by Edwards after the act had been done by Davis for which damages are sought by Shreve and Coombs.

But it is urged in argument, that if the evidence is incompetent it ought to have been objected to when first offered to the jury, and as it was suffered to be read to the jury, the application to the court came too late. We, however, think differently. Whether or not upon the facts supposed, the receipts were incompetent evidence, and ought to have been disregarded by the jury, is evidently a question of law; and it is never too late, during the progress of the trial and before the jury withdraw from the bar to apply to the court for a decision of a question of law. The ancient practice required objections to the admission of witnesses to be taken before they were sworn; but that strictness has long since been relaxed, and it has been held admissible to object to the competency of a witness at any time in the progress of the trial though he be examined in chief. It would, no doubt, have been competent for the court to have decided on the competency of the evidence without referring the facts to be decided by the jury; but it was equally competent to refer the decision of the facts to the jury, and as the evidence went to

establish the facts which we suppose rendered the receipts incompetent, we see no reason why the instructions should not have been given to the jury.

The judgment must, therefore, be reversed with costs, the cause remanded to the court below and further proceedings had, not inconsistent with this opinion.

LEWIS v. HERNDON.

[3 LITTELL, 388.]

A VENDOR SEEKING SPECIFIC PERFORMANCE, must show himself able as well as willing to give a clear title to the land.

IDEM.—Showing an uninterrupted possession of twenty years in himself and those under whom he claims is not sufficient.

APPEAL from the circuit court. The opinion states the case.

Bibb and Hardin, for the appellant.

Chapeze and Crittenden, contra.

By COURT. In pursuance to a contract made between these parties, the following writing was executed by them, to wit: "Article of agreement made and entered into this twenty-eighth day of June, 1819, between David Herndon, of the county of Breckenridge and state of Kentucky, of the one part, and David J. Lewis, of the county of Albermarle and state of Virginia, of the other part, witnesseth: That said Herndon has this day bargained and sold a certain tract of land, lying and being on the waters of Long Lick creek, on which he now resides, containing by plat and patent two hundred and twenty-four acres and twenty-two poles, and bounded by the following tracts of land: beginning at the corner of Thomas Owing, jun. and Thomas Owing, sen., and Levi ——— and John Moorman, for and in the valuable consideration of two thousand dollars, to be paid in three equal annual payments; the first payment to be made on the first day of May, 1820, and on the first day of May, 1821 and 1822; and the deed to be made on the day of the first payment as above mentioned. Possession to be given on the fifteenth of November, 1819. Whereas the parties have hereunto set their hands and seals the twenty-eighth of June, 1819. David Herndon. David J. Lewis."

To enforce the specific execution of this contract, Herndon, on the twentieth of October, 1820, exhibited his bill in equity, suggesting that in due time he would, through the court, tender

to Lewis a good and sufficient title to the land described in the written agreement, and alleging that in pursuance of the agreement, Lewis, on the fifteenth of November, 1819, took possession of the land and has occupied the same ever since; but that notwithstanding the first installment had become payable, Lewis has failed and refused to pay the amount thereof, and gives it out in speeches that he never will make payment, etc. The bill makes Lewis a defendant, and prays for a specific enforcement of the contract, etc.

Lewis answered, admitting the contract set forth in the written article of agreement. He states that being desirous to remove with his family from Virginia, where he then lived, to some healthful situation in the county of Breckenridge, he met with Herndon who proposed selling the land upon which he then lived; that after some conversation on the subject the terms of sale were agreed on between them; but that before the writing was executed, having understood difficulties frequently occurred in relation to the title of land in this country, and having also been informed that a disease, commonly called the milk or puking sickness, had often visited certain portions and situations of the county of Breckenridge with great fatality—threatening whole neighborhoods with death and desolation and bidding defiance to medical skill—and which disease was thought by many to arise from local causes hitherto unknown to the medical world, he was induced to inquire of Herndon whether the disease had ever visited his neighborhood, and whether his title was indisputable; and that in reply Herndon assured him the disease had never existed within less than seven miles of the land, and that his land was not only clear of dispute but that his title was indisputable; and that relying on these assurances he closed the contract as set out in the written agreement. He states that the disease alluded to had, in fact, to the knowledge of Herndon, not only prevailed within less than seven miles of the land, but had actually visited the immediate vicinity with great virulence; and he denies that Herndon had the title he pretended to sell, and calls upon him for due proof of his title, and that he exhibit it and file his title papers.

He admits that he received the possession of the land under the contract; but alleges that before he obtained the possession, suit had been brought for the land against Herndon, by a certain Mark Hardin, claiming under an adverse, and, as he is informed and believes, paramount title; and he charges Hern-

don with fraudulently concealing from him the fact of a suit having been brought by Hardin when the possession was delivered. He states that he tendered to Herndon the amount of the first installment in specie, and a bond for five hundred dollars, which he held on him, and demanded a title to the land; but Herndon failed to make the title, and acknowledged his inability to do so. He moreover charges that, discovering he had been deceived by the representations of Herndon, both as to the title and health of the place, he determined to abandon the contract and possession, which he accordingly did, after having given due notice to Herndon of his intention to do so. He protests against the court decreeing a specific execution of the contract; and after making his answer a cross-bill, prays for the contract to be canceled, etc.

To the answer of Lewis, which was made a cross-bill, Herndon responded, admitting that some inquiries about the disease and title, as are mentioned in the answer of Lewis, were made about the time the contract was made; but he denies that in his reply to those inquiries any false statements were made. He admits the disease had prevailed in some parts of the county of Breckenridge, but denies that it had ever visited the vicinity of the land, to his knowledge or belief. He admits that Hardin had previously brought suit for the land, but alleges that the suit had been determined against him, and when he sold the land to Lewis he considered Hardin's claim to be at an end. He admits that after the sale made by him to Lewis, Hardin commenced another suit for the land, and charges that Lewis was shortly thereafter informed thereof. He alleges that he and those through whom he claims had been possessed of the land for upwards of twenty years before Hardin's suit was commenced; and although he believes Hardin's claim to be of no validity when brought into contest with that under which he claimed, he charges that for the purpose of quieting all controversy with Hardin and Lewis, he has purchased the claim of Hardin and obtained his title, which he exhibits for the inspection of the court. He states that in due time he will exhibit his title, which he conceives to be complete when coupled with the possession ever since February, 1799. He insists upon a specific execution of the contract. The court below, on a final hearing, decreed the contract to be executed by both parties; and from that decree Lewis has appealed.

The evidence, we think, is not of a character calculated to establish in Herndon that clear and indisputable title which

ought to be shown by a complainant seeking the aid of a court of equity to enforce the specific performance of a contract for the sale of land. There is contained in the record enough to show that since the commencement of this suit Herndon has obtained a conveyance of Hardin's title; but that title is admitted by Herndon to be of no validity when brought in competition with the title claimed by him when he contracted with Lewis, and there is no sufficient evidence in the cause to prove that Herndon is invested with the title under which he then claimed. He appears then to have claimed under the title of Hargis, and it is proved that he and those through whom he claimed had been possessed of the land for upwards of twenty years before his sale to Lewis. That evidence may be sufficient to show that when brought into competition with the title of Hargis, that which Herndon has since obtained from Hardin could not prevail; but it is evidently insufficient to show that Herndon is now invested with the title of Hargis. Were it even conceded that from the lapse of time the land has been occupied under the title of Hargis, a conveyance from him might be presumed, it would not thence follow that the title might be inferred to be in Herndon; for Herndon appears not to have been possessed of the land sufficiently long to raise a presumption of his having obtained a conveyance from his immediate vendor, and there is not a particle of proof tending to establish the fact of such a conveyance having been received by him. Under such circumstances, therefore, we are not at liberty to infer that Herndon has become invested with the title of Hargis; and as that title is admitted by him to be paramount to the title which he has obtained from Hardin, he can not be admitted to have shown himself entitled to the aid of a court of equity. In fact, by failing to show an ability to convey the title of Hargis, Herndon has evinced the propriety of Lewis's conduct in abandoning the possession of the land, and instead of the decree which was pronounced by the court below, the contract ought to have been canceled and Herndon's bill dismissed with costs.

The decree must be reversed with costs, the cause remanded to the court below, and a decree there entered, not inconsistent with this opinion.

TO ESTABLISH A TITLE BY PRESCRIPTION an uninterrupted, continuous enjoyment of that which is prescribed for, is essential. Nor is this all that is required. The owner of the land may, when the adverse possession is taken, be a minor, a lunatic, or a married woman; and, if so, the statute of limita-

tions does not, in most of the states, run against him or her during the minority, lunacy, or coverture. Before we can feel assured that a title has become perfect by prescription, we must know not only that the property has been adversely held for the requisite time, but further, that it has been held against some person against whom a title by prescription could be acquired.

In *Melvin v. Whiting*, 13 Pick. 188, Judge Wilde, speaking for the court, said that in order to raise the presumption of title under a non-existing grant, the right should be used and enjoyed as against those who were able to resist the claim, and that if the persons against whom the claim was urged, were infants, the period of their non-age should be deducted in computing the time. The same rule was suggested in *Arbuckle v. Ward*, 29 Vt. 55; and made the reason of the decision in *Lamb v. Crossland*, 4 Rich. L. 536. The facts necessary to constitute a prescriptive title the party pleading it must allege and prove, so far as they go affirmatively to make out the right; but the burden of proving facts negative in character, which tend to defeat the right, as the infancy of the heirs of the servient estate ought to be with the party denying the prescription. While this is the general rule, we think that where one has covenanted to sell and convey a perfect title, and in fulfillment of his covenant tenders a title supported by prescription only, the burden ought to be upon him to show that the circumstances were such as to permit the acquisition of a title by prescription; or, in other words, that he ought to prove that the persons against whom he prescribes were not minors, or otherwise entitled to the benefit of some disability. In the absence of this proof his title is subject to reasonable doubt, is not marketable at the full value of the property, and ought not to be forced on an unwilling purchaser at a full price. Two principles, in the law of specific performance, seem to be well established: 1. That a purchaser will not be compelled to accept a title which is not marketable: *Taylor v. Williams*, 45 Mo. 80; *Powell v. Conant*, 33 Mich. 396; *Pratt v. Eby*, 67 Pa. St. 396; *Vreeland v. Blawvelt*, 33 N. J. Eq. 483; *Allen v. Atkinson*, 21 Mich. 351; *Freetly v. Barnhart*, 51 Pa. St. 279; *Swain v. Fidelity Ins. Co.*, 54 Id. 455; *Linhous v. Cooper*, 2 W. Va. 57; *Littlefield v. Tinsley*, 26 Tex. 353; 2. That he will not be required to take a title which will probably expose him to litigation, with adverse claimants: *Jeffries v. Jeffries*, 117 Mass. 184; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Richmond v. Grey*, 3 Allen, 25; *Sturtevant v. Jacques*, 14 Id. 523. A title by prescription may, nevertheless, in some cases, be so free from doubt, that a court of equity will compel its acceptance by the purchaser: *Shober v. Dutton*, 6 Phila. 185; *Pratt v. Eby*, 67 Pa. St. 376.

FINDLEY v. WILSON.

[3 LITTELL, 390.]

TRUSTEE'S POWER UNDER WILL.—A devise to an infant, with directions that another occupy the land during the infant's nonage, for the support of the family, but not to use the land in any other way, will not entitle the trustee or the infant's guardian to charge the land with improvements made thereon.

IMPROVEMENTS MADE UNDER A PAROL CONTRACT to lease, may be compensated for in damages.

A TRUSTEE WHO CAUSES IMPROVEMENTS to be made on the land of his ward by holding out the expectation of a lease, where no such lease can legally be made, is liable personally.

ERROR to the circuit court. The opinion states the case.

Crittenden, for the plaintiffs in error.

Sharp, Attorney-general, *contra*.

By COURT. By the last will of William Findley, sen., deceased, he devised to his son, Cyrus Findley, one hundred acres of land, and by a clause in his will directed "that his son, John Findley, should take care of Cyrus's land until Cyrus should come of age" (he then being an infant), "though not to use it in any other way than for the support of the family." After the death of the testator, Samuel Wilson settled upon the land devised to Cyrus, and after making some improvements thereon, sold his interest to one Houseworth for two hundred dollars, at the same time stipulating with Houseworth that he should quietly enjoy the same free from rent until Cyrus Findley should arrive at full age. Subsequent to this, under a proceeding for a forcible entry and detainer, instituted by John Findley, to whom the care of Cyrus's land was confided during his minority by the testator, Houseworth was expelled from the land.

Wilson then refunded to Houseworth the amount received under the contract of sale to him, and exhibited his bill in equity against John and Cyrus Findley to obtain compensation for the improvements made by him on the land of Cyrus. He charges that William Findley, the brother of both John and Cyrus, was regularly appointed guardian for Cyrus, and that he settled and improved the land under a parol contract made with William, the guardian, through the advice and consent of John, that he should enjoy the possession and profits of the land until Cyrus became of age, in consideration of improvements which he agreed to make thereon; that the contract was made in 1813, and Cyrus Findley would not be of age until 1820, and although no writings were executed, it was agreed that the contract should be reduced to writing in a short time, and that in the mean time he, Samuel, was to take the possession, and erect a house where John Findley should direct, which was accordingly done. He also charges that the improvements made by him are worth at least two hundred dollars, and sets out the sale by him to Houseworth, and the dispossession of Houseworth by John Findley; alleges that John

Findley has since leased out the land, and received the rents, and has in his possession the money of Cyrus, sufficient to pay for the improvements. He moreover alleges that William Findley, the guardian, is dead, and asks a decree against John and Cyrus for the amount of improvements.

John was appointed guardian *ad litem* for Cyrus, and answered the bill both for himself and Cyrus. He admits that a contract was made between his brother William and Wilson, but denies either of approving of the contract, or of assenting to it, though he acknowledges that after being informed of the contract, he did, at the request of his brother, William, point out the place where the house ought to be built. He admits that he has obtained the possession of the land, and leased it out; but denies having any of Cyrus's estate in his hands. He insists upon having made no contract with Wilson, and claims the benefit of the statute against frauds and perjuries, etc. The circuit court decreed that John Findley should pay out of the estate of Cyrus two hundred dollars, if so much of Cyrus's estate remained in his hands; and if John, after being served with a copy of the decree, should fail to make payment, that Wilson should recover the amount of two hundred dollars from the estate of Cyrus, and that execution should go accordingly. Cyrus was decreed to pay costs. To reverse that decree, this writ of error has been prosecuted.

1. The most essential difference that exists between the statements of the parties, consists in John Findley denying the contract to have been made between William Findley and Wilson, through his advice and consent, as is alleged by Wilson. But whether the answer of John in that respect be true or false, the principle is not perceived upon which the decree against Cyrus can be sustained. It is perfectly clear that John Findley derived no authority from the will of William Findley, senior, to create by contract, or otherwise, any charge upon Cyrus for improving his land. By the will, the care of Cyrus's land, during his minority, was confided to John, and John may have possessed competent authority to make any contract not incompatible with the object and design of the testator in creating the trust. But the case of Cyrus's land was not confided to John for the purpose of causing improvements to be made at the expense of Cyrus; it was to enable John, during Cyrus's minority, to use the land for the support, and the support only, of the testator's family. Had the alleged contract between William Findley and Wilson, therefore, been made through

the assent and advice of John Findley, it ought not, and cannot subject Cyrus to the payment of Wilson's claim for improvements. For, by the contract, Wilson was to have been paid for improving the land, by possessing it, and enjoying the profits during Cyrus's minority; and as by the will of his father, Cyrus was not to enjoy the profits of the land until he arrived at full age, it would be palpably unjust to subject him to any claim which Wilson may have for not being permitted to occupy the land under his contract with William Findley, though the contract may have been made through the advice of John Findley.

2. Nor can the circumstance of William Findley, with whom Wilson contracted for the lease, being the guardian of Cyrus, raise any liability on Cyrus for the improvements; for if, as we suppose, the will has directed the use of the land during the minority of Cyrus, to a specific object, and has made John Findley the trustee to carry that object into effect, in his character of guardian, William Findley certainly possessed no authority over the land, and consequently could make no contract in relation thereto, which can form the basis of any charge against his ward. The decree as to Cyrus must, therefore, be reversed. But as the cause must be remanded to the court below, it is proper that we should direct what disposition should be made of it as respects the interest of John Findley.

3. And here it is proper to remark that as the contract under which the improvements were made by Wilson, was for a lease for a longer term than one year, it comes emphatically within the statute against frauds and perjuries, and possesses no legal validity. Wilson, however, confiding in the assurances which were made, that the contract would be fulfilled, appears to have bestowed his labor and expended his money in improving the land, and as he has not been permitted to enjoy the possession, in anticipation of which the improvements were made, will have to submit to the mortifying reflection of having lost his labor and money, unless redress is afforded him against those by whom he was induced to enter into the contract and make the improvements. We do not, however, admit that the law affords no remedy to Wilson. In moral justice, those by whom he was induced to bestow his labor and spend his money in improving the land, ought to make adequate compensation; and we are incapable of perceiving the principle of law or equity that forbids the interposition of the chancellor in his favor. There is as much propriety in compelling compensation for improve-

ments made upon land under a parol contract for a lease, which is not fulfilled, and which, in consequence of the statute against frauds and perjuries, cannot be enforced, as there is for compelling the vendor of land, by parol contract, to restore to the vendee the consideration paid for the land, where he refuses to execute the contract; and relief has often been decreed by courts of equity in such a case. And in the case of a parol contract for a lease, it is said that after a refusal of the contractor to execute the lease, he will be compelled to restore to the person with whom he contracted, the amount of money expended in necessary repairs and lasting improvements: 1 Vern. 159.

4. Hence it results that when the cause returns to the court below, a decree must be there entered in favor of Wilson against John Findley; for the proof is abundant to show that although John Findley did not in fact contract with Wilson for the lease, he was fraudulently instrumental in inducing Wilson to enter upon and improve the land, and that Wilson's assignee has been in fact deprived of the benefit of the contract for the lease, by the act of John Findley.

The decree must be reversed, with costs, the cause remanded to the court below, and a decree there entered dismissing Wilson's bill, with costs, as to Cyrus Findley, and giving him relief against John Findley, for the improvements upon the land, etc.

STARK v. CANNADY.

[3 LITTELL, 399.]

A PAROL SUBMISSION TO ARBITRATION concerning the title to land is within the statute of frauds.

THE STATUTE OF FRAUDS DOES NOT FORBID the enforcement of trusts and equities resulting from a transaction by implication of law.

UNDER A PAROL CONTRACT OF EXCHANGE of lands, where the contracting parties have occupied the tracts exchanged, neither can recover rents of the other. But on declaring such exchange void, the value of the lasting improvements at the time of the decree should be taken into consideration by the court.

APPEAL from the circuit court. The opinion states the case. *Hardin*, for the appellants.

Tulbot and Bledsoe, contra.

By COURT. This was a bill filed by Cannady against Stark, to coerce a conveyance of one hundred and eight acres of land

in Bourbon county, fifty acres of which he claimed under a bond executed by Stark to Kirthly, assigned by him to Creek, and by the latter to Cannady, and four acres by purchase from Stark himself; but as to these fifty-four acres, the controversy was adjusted between the parties, during the progress of the cause, and need not be further noticed. With respect to the remaining fifty-four acres, Cannady alleges that on the eleventh of July, 1794, he advanced to Stark sixty dollars, with which he was to purchase for Cannady land, upon as good terms, and as convenient to Cannady as he could; and he exhibits a written receipt of that import signed by Stark. He charges that Stark purchased of Pickett, in Virginia, whither he was then about going with that view, three hundred acres, part of a five-thousand-acre tract lying near to where they lived, at the price of one hundred pounds, and paid to Pickett the sixty dollars which he had advanced, in part of the price; that shortly afterwards Stark had the three hundred acres surveyed and laid off for him, as a part of the purchase, fifty-four acres; that an agreement was made between them, whereby he agreed to let Stark have these fifty-four acres, for another tract of fifty-four acres adjoining the land on which he lived, and that Stark accordingly laid off to him other fifty-four acres, the possession of which he has had ever since; but that Stark, not long after this agreement to exchange began, showed a disposition to dispute Cannady's right, unless he would contribute his proportion of the expenses which Stark had laid out in relation to the title, and that they at length agreed to submit the controversy to arbitrators, who awarded that Stark should convey the land, and that Cannady should pay his proportion of those expenses; and he alleges that Stark owed him, on other accounts, a sum equal to his part of the expenses, and agreed to settle it in that way; but that he has since refused to do so, and has brought suit and recovered judgment in ejectment against his tenants on the land. He prays for a conveyance of the land, and if that cannot be obtained, compensation for his improvements, and for general relief.

Stark, in his answer, admits that when he was about going to Virginia, to purchase the land of Pickett, Cannady furnished him sixty dollars, for which he was to have a part of the land; and that he made the purchase of three hundred acres, and on his return had the same surveyed, and laid off for Cannady fifty-four acres; but he does not admit that any part of the money advanced by Cannady was paid for said land; and he

alleges that in addition to the one hundred pounds, he was to render other services for Pickett, in relation to the title of the five-thousand-acre tract, as a consideration of the three hundred acres, and that he never agreed to convey to Cannady the land laid off for him, unless he would contribute his proportion of the charges and expenses incurred in relation to the five-thousand-acre tract, which Cannady always refused to do. This, he avers, gave rise to the controversy, which was verbally referred to arbitrators, with whose award he was willing to comply, and insists upon Cannady failing to do so. He answers evasively as to the agreement to exchange; alleges that the reference and award were in relation to the land purchased from Pickett, and that the land claimed by Cannady under the exchange was not within the three hundred acres so purchased. He admits that Cannady has had possession of it, but alleges that it was only recently before the commencement of this suit that he obtained the legal title, and insinuates that for want of the legal title, he could not sooner have evicted Cannady. He insists that Cannady, by his refusal to pay him for the expenses and trouble incurred in relation to Pickett's claim, has forfeited all right to the land; and he pleads and relies upon the statute of limitations, and the statute against frauds and perjuries in bar of the relief sought by Cannady.

The circuit court disregarded the agreement to exchange and the submission to arbitrators, as being merely verbal, and not such as could be enforced under the statute against frauds and perjuries; but was of opinion that the agreement of Stark to purchase for Cannady was binding; and that Cannady was entitled to the same proportion of the three hundred acres as sixty dollars bears to the whole price paid by Stark; and that the price consisted of the one hundred pounds, and all the expenses and trouble incurred by Stark relative to the title of Pickett's claim, over and above the one hundred pounds which Pickett, by the agreement with Stark, was to have paid towards that object; and for the purpose of ascertaining the amount of those expenses, and the compensation for Stark's trouble, and of laying off Cannady's portion of the three hundred acres; accordingly, commissioners were appointed, who were moreover directed to assess the value of the improvements and the amount of the rents of the part allotted to Cannady, and make report. In this state of things Stark died; and the suit being revived against his heirs and administrator, the commissioners made a report, by which it appeared that they had laid off for Can-

nady thirty-eight acres and twenty-nine poles as his proportion, and that there was a balance of rents in his favor against Stark for three hundred and ninety-nine dollars and ten cents, and the court pronounced a final decree accordingly, from which Stark's heirs and administrator have appealed to this court.

It is very evident that the statute of limitations is no bar to the relief sought by Cannady; for time never runs against one in possession. And besides, Stark, as he admits, did not obtain the legal title until shortly before the institution of this suit; and until he had obtained the title, Cannady's cause of action against him was incomplete:

1. There is, however, no doubt that the statute against frauds and perjuries precludes the court from giving relief upon the agreement to exchange lands, as well as upon the award of the arbitrators; for the agreement to exchange, and the agreement of submission to the arbitrators, were both verbal, and cannot under the statute be enforced. But the same thing cannot be predicated of the original agreement by Stark, to purchase land for Cannady.

2. Though Stark does not admit the fact, yet it is satisfactorily proved that he paid towards the price of the three hundred acres the sixty dollars advanced by Cannady; and it may well be doubted whether from this circumstance alone an equity would not have resulted to Cannady by implication of law; for we apprehend where an agent verbally employed to purchase land for his principal, does so with the money of his principal, but makes the contract in his own name, that a trust for the principal will result by implication, which is not affected by the statute against frauds and perjuries; for the statute alone forbids the enforcement of a trust or equity created by contract, and not such as results from the nature of the transaction by implication of law. But whatever may be the rule in a case of that kind, there can, we think, be no doubt in one like the present, where the party, by a writing signed by himself, acknowledges the receipt of the money, and binds himself to make the purchase, which he accordingly does, with the money which he received for the purpose. We concur, therefore, with the circuit court in the opinion that the original contract by Stark to purchase for Cannady is not within the statute against frauds and perjuries, and that Cannady is entitled to a decree for a part of the three hundred acres purchased of Pickett; nor is there any doubt but that the part which should be decreed to him should bear the same proportion to the three

hundred acres, as sixty dollars bears to the whole consideration paid therefor by Stark. By the written agreement between Stark and Pickett, filed in the cause, it appears that in addition to the one hundred pounds Stark agreed to have a general plat of the whole five-thousand-acre tract, with the interfering claims, made out, as a consideration of the three hundred acres, Pickett agreeing to pay the sum of four dollars towards the expense of surveying. In fixing the consideration of the three hundred acres, the trouble and expense of making out such general plat should be ascertained, and that sum, when ascertained, with a deduction of four dollars, should be added to the one hundred pounds, as making the entire consideration of the three hundred acres, and Cannady's part proportioned accordingly. But the circuit court seems to have required the commissioners to also take into the estimate Stark's services in other respects in relation to the title, and other expenses incurred by him in fixing the consideration of the three hundred acres; and the commissioners have in fact done so in their report, and thus diminished the quantity of land to which Cannady was entitled below what it ought to be. Cannady ought, no doubt, to contribute his due proportion of the expenses of the suit brought by Stark against Pickett's heirs, to obtain the legal title of the three hundred acres, if on account of their not being within the state the costs could not be made of them as Stark alleges. But these expenses ought not to be taken as a part of the consideration of the three hundred acres; nor ought Cannady to be charged with or made liable to any other expenses, or for the personal services of Stark in other respects, as he has been by the report of the commissioners. In these respects the decree of the circuit court is more prejudicial to Cannady than it ought to have been; but Stark's representatives cannot for that complain. They have, however, just cause to complain of the decree as it relates to the rents; for there is no principle upon which they ought to be made to account for the rents of that part of the three hundred acres decreed to Cannady, as the circuit court has done, without making him account for the rents of the lands which he has had the possession of, as an equivalent therefor, under the verbal contract to exchange.

3. We are inclined to think, however, that as each was permitted by the other to enjoy as his own, the land he possessed under the contract for the exchange, he ought not to be accountable to the other for the profits he has received. But the im-

provements on the respective parcels of land may be of unequal value; and in proportion, as this may be the case, the one will be benefited to the prejudice of the other, unless he who received the parcel in the greatest degree enhanced in value by the labor of the other, is made to account to him for the difference. An estimate, therefore, of the value of the improvements made by the parties respectively upon the land in his possession, and which is to be restored to the other, ought to be taken by commissioners; and in doing this, the improvements ought to be estimated in their deteriorated state, and in proportion as the value of the land is thereby enhanced, and the balance should be decreed to the party in whose favor it shall be found.

The decree of the circuit court must be reversed, with costs, and the cause be remanded, that a decree may be entered not inconsistent with the foregoing opinion, and such other decrees and orders as may be agreeable to equity.

PRICE v. TOWSEY.

[3 LITTELL, 423.]

A PARTNER'S ACTS AFTER DISSOLUTION of the partnership will bind the other partners unless notice of the dissolution be given.

VOLUNTARILY PAYING ANOTHER'S DEBT will not constitute one the creditor of that other; but such payment is a sufficient consideration to support a promise of repayment.

ERROR to the circuit court. The opinion states the case.

Crittenden, for the plaintiff in error.

J. J. Marshall, *contra*.

By COURT. This was an action of assumpsit brought by Zerah Towsey and Robert Chambers, merchants, trading under the style and firm of Zerah Towsey & Co., against Gardner Price and John Fisher, late partners, doing business under the style of Gardner Price & Co., for goods, wares, and merchandise, and for money laid out and expended. The general issue was pleaded with notice of relief. On the trial the plaintiffs introduced a witness who declared, that one of the plaintiffs had contracted with the firm of Gardner Price & Co. for the building of a brick house, in the town of Burlington; that an account was raised in the books of Zerah Towsey & Co. by Gardner Price & Co., and goods taken up to the amount of \$—— whilst the building was proceeding. He also stated

that an account had been raised with the firm of Zerah & Moses Towsey of two hundred and ninety-nine dollars and twenty-eight cents against Gardner Price & Co., and without their knowledge the account was transferred by the witness from the books of Zerah & Moses Towsey to the account against the firm of Gardner Price & Co. on the books of Zerah Towsey & Co., and a credit entered on the books of Zerah & Moses Towsey for that amount, so that their account with the last-mentioned firm stood balanced. The witness further stated that on the first day of March, 1820, being about eighteen months after the defendants had ceased to carry on the business of brick-making and laying, in which they were partners, he had an interview with Gardner Price alone, and exhibited the book containing the account against the firm of Gardner Price & Co. which had been transferred from the books of Zerah & Moses Towsey to the books of Zerah Towsey & Co., and the defendant, Gardner Price, admitted that the account was correct, but refused to give his note for the balance, alleging that the firm of Gardner Price & Co. had a charge for extra work on the building which would exceed the balance due Zerah Towsey & Co.

It was proved by another witness that about eighteen months before the admission of the account, as stated by the former witness, Gardner Price and John Fisher had ceased to work as builders, and that about six months before the admission they had dissolved their partnership and that Fisher had taken upon himself the settlement of the affairs of the firm; but the witness did not know that there was any publication made of the dissolution of the partnership, or that the plaintiffs, Zerah Towsey & Co., had any notice of the dissolution. Upon this state of facts the defendants, by their counsel, moved the court to instruct the jury, if they were of opinion that the account of Gardner Price & Co. was transferred from the books of Zerah & Moses Towsey, without their consent or knowledge, that the admission of Gardner Price alone, eighteen months after the dissolution of the partnership, did not bind the late firm of Gardner Price & Co., and that they ought to exclude that item from the account; but the court overruled the motion and refused to give the instruction, to which the defendants excepted, and a verdict and judgment having been rendered against them, they have brought the case to this court by writ of error with *supersedeas*.

1. The only question which was directly presented by the

motion made to the circuit court to instruct the jury was, whether the admission made by one of the defendants after the dissolution of their partnership was binding upon the firm or not. In the case of *Walker and Evans v. Duberry*, 1 Marsh. 189, it was held by the court, that a certificate given by one partner, after a dissolution of the partnership of the amount of a debt due from the firm was not admissible evidence to prove the debt in an action against the firm. But in that case, it appeared that the plaintiff at the time the certificate of the amount of the debt was given, had notice of the dissolution of the partnership; whereas, in this case, there was no proof of any notice having been given of the dissolution of partnership, or of the plaintiff having any knowledge of the fact; nor was the court asked to instruct the jury that the admission was not binding upon the hypothesis of the existence of such notice, and the law is well settled that the act of either of the partners, notwithstanding the dissolution of the partnership, will continue to be obligatory upon the other, until due notice of the dissolution is given: *Watson's Law of Partnership*, 183; *Lex Mercatoria* 460; *Phil. Ev.* 73.

The question, therefore, which was directly presented by the motion to the circuit court to instruct the jury was, no doubt, correctly decided by that court. But indirectly there is another question involved in the motion, and that is, whether the admission by Gardner Price of the correctness of the account transferred from the books of the firm of Zerah and Moses Towsey to those of the plaintiff, was sufficient to make him responsible to the plaintiffs for the amount of that account, for if he did not thereby make himself responsible to the plaintiffs, his copartner could not be responsible.

2. It is perfectly clear that the defendants could not be made liable to the plaintiffs by the mere act of transferring the debt from the books of Zerah and Moses Towsey, to those of the plaintiff, without the knowledge or consent of the defendants; for an account is not by law assignable, so as to authorize an action in the name of the assignee. The transfer of the debt, however, from the books of the one company to those of the other, may with propriety be considered as a payment, or at least as evidence of a payment of the debt, by the latter to the former; but even thus considered, it cannot, *per se*, give the plaintiffs a right to maintain the action against the defendants, for the amount of the debt; for no one can, by voluntarily paying the debt of another, without his knowledge or consent, become his creditor. But the payment of the debt by the plaintiff

iffs for the defendants, is a sufficient consideration to uphold the agreement subsequently made by the defendants to repay it to the plaintiffs. Thus it is said where a man pays a sum of money, or buys goods for me without my knowledge or request, and afterwards I agree to the payment or receive the goods, this is equivalent to a previous request, and I will be bound by the agreement: 1 Com. on Con. 23.

There is, therefore, no error in the refusal of the circuit court to give the instruction asked by the defendants, and the judgment must be affirmed with costs and damages.

WILSON v. KING.

[3 LITTELL, 487.]

REPLEVIN BY PART OF THE DEFENDANTS.—It is not clear that a part of the defendants in an execution can replevy; but if a part do replevy, they will not be permitted to vacate the bond, on the ground that the other defendants are not obligors in it.

THE OFFICE OF DEPUTY SHERIFF AND JUSTICE OF THE PEACE are incompatible, and the acceptance of the latter will vacate the former.

OFFICER DE FACTO.—The acts of a deputy sheriff as such, after he has qualified as justice of the peace, are not on that account void. A replevin bond, taken after the qualification as justice, cannot for that reason be set aside on the motion of the obligors.

APPEAL from the circuit court. The opinion states the case.

Sharp, Attorney-general, for the appellant.

Monroe, contra.

By Court. This is a motion to quash a replevin bond, made by the obligors in the bond. The court below sustained the motion and set aside the sale, from which this appeal is prayed.

1. One ground relied on is that the original execution was against one more defendant than there were obligors in the bond; or, in other words, that the sheriff had permitted part of the defendants in the original execution to avail themselves of the privilege of replevying the debt, omitting the rest. There have been two decisions of this court, anciently, on this point; one deciding that it was necessary that all the defendants in an execution should join before a replevin was allowed; the other, that it was not necessary that all should join. Perhaps the only way to reconcile these two cases, is that in the first case the motion to set aside the bond was made on the part of the plaintiff in the execution; in the latter, the motion was

made by the defendants; and in this attitude both decisions might be sustained. For it is a point, by no means clear, that, according to the law under which this bond was taken, a part of the defendants should be permitted to replevy when the rest did not join. But waiving any positive opinion on this point, we are clearly of opinion that the parties who did avail themselves of the privilege of replevying, ought not to be permitted to avail themselves of the objection; for, conceding that the law did not allow them to replevy, unless all joined, it would be preposterous to permit those who availed themselves of the privilege for their ease and benefit to complain that they had too much, or more indulgence than the law permitted. This objection, therefore, can not be sustained.

2. The next question worthy of notice, and probably that which was sustained by the court below, arises out of the following facts: the deputy sheriff who took the bond had been regularly deputed and sworn as deputy for the then principal sheriff of the county, and during his period of service he was commissioned as justice of the peace for the county, and accepted the commission, took the oaths required by law, and did many acts pertaining to the office of justice of the peace. He still, however, continued to exercise the office of deputy sheriff in every part of its duties, and was recognized by the courts of the county as deputy sheriff, notwithstanding his commission as justice of the peace, and during this period, while he combined the duties in himself of both offices, he took the replevin bond in question. We readily concede that these two offices are clearly incompatible, both at common law and by the more potent constitutional principle which forbids the combination of executive and judicial powers in the same person. Although he was but a deputy sheriff, yet, as such, he could exercise all or nearly all the functions of the office of principal, which clearly belongs to the executive department of the government; and it would be prostrating the power of the constitution to say that the deputy would not be disqualified from doing what his principal would be disqualified to do under the same circumstances. We conceive it also clear that by the act of assembly, passed on the twenty-first of December, 1799, 2 Dig. L. K. 974, the acceptance of an office incompatible with the one held, vacated the first office. But while we concede thus far, we by no means admit that the acts of the deputy sheriff while in this situation were void, or that they must be so held where the rights of third persons are concerned and his acts are collaterally brought in question. In a

proceeding against the officer, questioning his right to exercise the office of deputy sheriff, these principles ought to be maintained, but must not be allowed to operate on the rights of third persons. He was indubitably an officer *de facto*, and according to the principles recognized by this court at the last term in *Stevenson etc. v. Miller etc.*, 2 Lit. 309; and at the present term in the case of *Commonwealth v. Arnold*, his acts must be held valid between third persons.

It has been contended in argument that this doctrine only applies where the officer *de facto* was brought in by color of office, and that as he was brought in by a valid appointment, which he afterwards vacated, the case is different and all color or protest was destroyed. We cannot agree that the facts of this case, or the reason of the rule, will make this case an exception. Indeed, its applicability is more strong than in case of a first colorable appointment. Here he came in rightfully, and by the record of his appointment and his exercise of the office, still appeared to continue rightfully in the office, and his title was affected by the reception of a commission and an oath of office in pais only. We, therefore, conceive that his acts are valid, and must be so held between others, be his own responsibility what it may.

The judgment must, therefore, be reversed, with costs, and directions given to the court below, there to overrule the motion to quash the replevin bond, with costs.

ELMONDORFF v. CARMICHAEL.

[3 LITTELL, 472.]

AN ALIEN COULD HOLD LANDS by purchase by the common law of England, adopted by Virginia at the revolution, until divested by inquest of office, but he could not take by descent.

INQUEST OF OFFICE was absolutely necessary to divest an alien of lands acquired by purchase.

A PATENT MIGHT LAWFULLY ISSUE TO AN ALIEN, under the act of 1779, during the time allowed him to become a citizen; and if he became a citizen within that time, though after the issuance of the patent, the legal title thereby became vested in him.

BECOMING A CITIZEN OF ONE OF THE UNITED STATES, after the ratification of the articles of confederation, entitled the person to the rights of citizenship in Virginia.

TO RENDER ADMISSIBLE A COPY of a lost instrument which, if produced, would not be admissible without proof of its execution, it is essential that the execution of the original be proved.

A COPY OF A WILL executed in a foreign country, sworn to be a true copy by one of the attesting witnesses, who also testified that the will was attested by two others in the presence of the testator, that he acknowledged the will to be his, and that he was of disposing mind, is admissible.

RECITALS IN PRIVATE STATUTE are evidence between the applicant and the commonwealth, but not between the applicant and other individuals.

A TITLE SUBSEQUENTLY ACQUIRED BY THE COMMONWEALTH by escheat, from an elder patentee, will not inure to the benefit of a junior patentee. The commonwealth may convey this title to another, who will have all the rights of the elder patentee.

THE SOVEREIGNTY IS NOT SUBJECT TO IMPUTATIONS of fraud, is not bound by the doctrine of estoppel, nor do her grants imply warranties.

APPEAL from the general court. The opinion states the case.

Haggin and Crittenden, for the plaintiff.

Wickliffe and Bibb, contra.

By COURT. This was an ejectment, decided in favor of the tenants or defendants in the court below. The parties claim under adverse patents, issued by the commonwealth of Virginia. That set up by the lessors of the plaintiff is the eldest in date, and was issued to Robertus Samuel Brandtz, on the eleventh of October, 1784. But it is shown that at the time the patentee was an alien and a native of the Netherlands; and that on the eighth of November, 1784, not quite one month after the patent issued, he took the oath of naturalization in the state of Maryland, before a competent tribunal, pursuant to an act of the legislature of that state, admitting foreigners to become citizens. It is, therefore, contended that this grant to an alien is void, and passes no estate, or not such an interest as will support an ejectment; and this is the first question presented for our decision.

1. From the authorities cited, and the investigation the court has made on this subject, the following general rules are discovered to have existed in the laws of England at our separation from that country: 1. "That an alien may take land by purchase and is clothed with the title; but he holds it for the use of the ground, and may be divested of it by an inquest of office found. This inquest, however, is absolutely necessary before the title can be taken from him." 2. "That an alien cannot take a title by descent, as he can by purchase; and in case the heir is an alien, the title is immediately vested in the crown, and no inquest is necessary for that purpose, although an office of instruction may be found." There can be no doubt that the commonwealth of Virginia, when it assumed its repub-

lican character, succeeded to the rights and privileges of the crown of England as to her own domain. And it is equally clear that she adopted the laws in force there at a certain period; so far as they were compatible with the genius and spirit of the new government, and were not locally inapplicable. Without inquiring into the policy of the foregoing principles, or investigating the reasons which gave them birth, we have no doubt they were also adopted by Virginia, at the revolution, and composed part of her code, and ought to be adjudged to exist, until altered by the legislature. This has been held to be true in New York, with regard to that state, and is so decided with regard to Virginia, by the supreme court of the United States, in the case of *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603. It is also decided in that case that a devisee is a purchaser within the meaning of the rule, and can, and does, take the estate devised to him.

2. But that a grantee from the crown or government would or could take an estate by patent, and hold it for the use of the government, is a point not so clear. There is a considerable difference between him and the purchaser from an individual. The reasons which operate in the latter case are not as patent in favor of the former. Besides, many dicta in the English authorities are against it: See Bro. Abr. tit. Patent, 44; 7 Viner's Abr. tit. Prerogative, p. 78; 2 Bl. Com. 347, 348, and Tucker's note; Jacob's L. Dict. under Grants from the Crown. There is, however, opposed to these authorities, the case of *Craig et al. v. Radford*, 3 Wheat. 594, in the supreme court of the United States, precisely in point with the present. But this case is decided on the authority of the case of a devisee, in *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603, supposing the case of the devisee and that of a grantee from the state to be precisely parallel. Besides, the question does not appear in that court to have undergone the same minute investigation of authority, the mature deliberation, and the application of reason, which usually characterize the decisions of that enlightened tribunal.

3. Without, however, weighing these authorities, and determining which ought to preponderate, we shall, assuming the law for the present to be that an alien cannot take by a grant from the government, look into the statutes of Virginia, which originated these claims now in contest, and see how far she has recognized these principles, or aided the case of the alien. It is at once evident the legislature did recognize the repugnance of the common law to an alien holding the soil; for in

the act of 1799 (1 Lit. 415), it is provided that "all persons, as well foreigners as others, shall have the right to assign or transfer warrants and certificates of survey for lands; and any foreigner purchasing lands may locate, and have the same surveyed, and after returning a certificate of survey to the land-office, shall be allowed the term of eighteen months, either to become a citizen or to transfer his rights in such certificate of survey to some citizen of this, or any other state of the United States of America." This provision acknowledges the common law principle that an alien could not hold, by enabling him *sub modo* to purchase. But while it does this, it provides for a class of cases which includes the right of Robertus Samuel Brandtz. It has made an inroad upon the common law. It supposes that aliens may purchase, and enables them to do so, and again to sell. It permits them to locate, survey, and return the plats, and then gives them eighteen months either to sell or become citizens. From this it is evident, if they did sell, the citizen purchaser acquired a good title. It as clearly follows that if they became citizens in the same time, they might keep it themselves. If this is not necessarily implied in these provisions, they mean nothing, and are wholly inoperative. Why give the foreigner time to sell, if he could not sell, and his purchaser could receive nothing? And give him time to become a citizen when he could gain no title by it? Why tantalize him with the prospect of obtaining land by acquiring citizenship, and then slip the land from him, because he was an alien. Hence we conclude that an alien could acquire title by becoming a citizen. The question then remains, did Robertus S. Brandtz so comply with these questions as to entitle him to hold these lands?

By recurring to his grant it appears that he claims as the assignee of another individual. At what stage of the title he acquired his interest does not certainly appear in this cause; but if we suppose it as early as the warrant itself, he was authorized to locate and survey. One of these surveys (as there are two in question) was made on the nineteenth, and the other on the twenty-third of January, 1783. Fifteen months were allowed him to return the survey to the land-officer. But supposing him to have done it much sooner, not more than eighteen months could have elapsed before he became a citizen of Maryland, as the register was allowed nine months before the grant must issue, and there were but twenty-one or two months between the dates of his surveys and the date of his citizenship.

The question then arises, did this acquisition of citizenship enable him to hold these lands? Had he become a citizen of Virginia in any legitimate mode recognized by the laws of that state, no doubt of his title could be reasonably entertained.

4. But will the citizenship conferred on him by Maryland answer the purpose? By the act he was authorized to buy, and he had bought; his right was preserved, subject to the contingency of becoming a citizen. Waiving the inquiry whether the expressions of the act confined him to become a citizen of that state, and assuming, for the purpose of argument, that it did, we turn ourselves to a provision in the articles of confederation then in force, which must have an important bearing on this subject. The expressions alluded to are: "The free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall, in every other, enjoy all the privileges of trade and commerce." This construction of the expressions of this fourth article is not clear of difficulty. It may plausibly be argued that the free inhabitants, though not citizens in any state, would be entitled to the privileges and immunities of citizens in every other; that is, to greater privileges than enjoyed by them in the state in which they dwell. But it is not necessary to give the expression "free inhabitants" as a latitudinous construction in this case. It is sufficient if the meaning intended be free citizens. In such case they were entitled to the privilege of citizens in every state. No difference in what state citizenship was acquired, it entitled to the same privileges in all. So that as soon as Robertus S. Brandtz became a citizen of Maryland, *eo instante* he was entitled to all the privileges and immunities of a free citizen of Virginia. And however absurd it may appear that any state could naturalize and admit by law, and that law be so operative as to confer the same rights *extra territorium*, yet this phenomenon was presented under the operation of the articles of confederation. It would seem to give the article in question no effect to say that Brandtz was entitled to the privileges and immunities of Virginia, and yet that he could not hold the land to which he was previously entitled there, and that the grant should be inoperative in his hands when it could be valid in the hands of a citizen of Virginia. Hence we conclude that he was entitled to the land.

The objection made to this is, that his patent issued before the acquisition of citizenship in Maryland. To this it may be

answered that he previously held an inchoate title in Virginia, subject to be defeated by his failing to become a citizen, and that the act of his becoming such had relation so far as to confirm his estate; for the principle is well settled, that if an alien acquires real estate, and is afterwards naturalized, it has relation back, and confirms the estate so acquired: 2 Bl. Com. 250; 2 Bac. 79. A further objection may be stated, arising from the expression of the Virginia act, authorizing the foreigner to sell by assignment only of the plat and certificate. Hence, it may be contended that no patent ought to have issued for that period, or until the foreigner was naturalized. To this it may be replied that the register was bound to receive the plats and certificates; and all that he did receive, by the subsequent directions of the same statute, he was to register, and to issue patents thereon, within not less than six nor more than nine months. He was not, therefore, to wait the citizenship of the holder of any plat and certificate. The patent might issue and the estate be still dependent upon the contingency of citizenship; and on that happening, the estate was complete. Hence, we conclude that under the peculiar indulgence given to foreigners, by the Virginia statute, appropriating these lands, and the citizenship acquired in Maryland, and the privileges and immunities of that citizenship being extended by the articles of confederation, Brandtz acquired a complete title, not even subject to be defeated by an inquest of office, if one was produced. If there should be any doubt in this, the legislature of Kentucky, at their session of 1796, confirmed his estate in these lands, by releasing all claims which the state might have by reason of his alienage; so that the possibility of recovering the lands by inquest of office, was forever abandoned by the state.

The next event which happened in the title of the plaintiffs below, was the death of the patentee, leaving an only son, who was an alien, and could not inherit; nor, as before said, was it necessary for any office to be found for the purpose of completely vesting the lands in the commonwealth; of course, the title was escheated to the government. His alien son, Johannes Brandtz, after the death of the father, by an agent in New York, sold and conveyed these lands to Charles Smith, who conveyed them to Isaac and Nicholas Gouverneur, who, being aware of the escheat that had taken place, applied to the legislature of Kentucky, and they, at their session of 1799 (Session Acts, p. 118), passed an act reciting the transfers, as they were presented to the legislature, in a preamble, and then follows the

enacting section: "Be it enacted that all the right of the two tracts of land, containing five thousand acres, and five thousand eight hundred and twelve acres, lying on Plum creek, in the county of Shelby, which the said Robertus Samuel Brandtz had, before and at his death, and the right of Johannes Brandtz, his legal heir and representative, shall be, and is hereby vested in the said Isaac and Nicholas Gouverneur, and their heirs, in the same and as ample a manner as if the said Robertus Samuel Brandtz had done in his life-time, or as if the said Johannes Brandtz had been a naturalized citizen when he executed the power of attorney for the sale and conveyance of said lands."

5. After reading this act, the appellants offered in evidence a copy of a letter of attorney from J. Brandtz, corresponding with that alluded to in the preamble of this act. The copy was objected to because it could not be given in evidence as a recorded paper under the laws of the commonwealth, and because the non-production of the original was not accounted for, and there was no proof of the execution of the original. The objection was sustained, and, we conceive, properly. For although there was some proof that the original could not be found, yet there was no proof of the execution of the original, or indeed that it existed, except what the recital in the preamble of the aforesaid acts relative to the title of Robertus S. Brandtz afforded.

6. The will, also, of Nicholas Gouverneur, was rejected on the trial on the application of the defendants below. We cannot approve of the rejection of this will. It is the same which was decided to be inadmissible in this cause when formerly before this court: See 4 Bibb, 484. But on the trial the copy was presented, with the deposition of one of the subscribing witnesses, who deposes the copy to be correct; that he and the two remaining witnesses attested it in the presence of the testator, who acknowledged it as his will, and that he was at the time, of disposing mind and memory. The same witness proved the death of the testator, and under such circumstances we see no reason why a will may not be given in evidence, on a trial, when proved to have been executed according to the statute, as well as any other title paper which cannot be read as a recorded instrument: See *Hood v. Mathers*, 2 Wash. 555, and *Bowman v. Bartlett*, at the spring term, 1821. We, therefore, conceive that the court erred in rejecting this will.

7. The court also instructed the jury, on the application of the defendants below, that the recitals in the preambles of the before recited statutes of 1796 and 1799, that Robertus

S. Brandtz was a naturalized citizen of the United States, and a letter of attorney and conveyance from Johannes Brandtz were not evidence of these facts as against the defendants. The facts recited in the preamble of a private statute may be evidence between the commonwealth and the applicant, or the party for whose benefit the act passed. But as between the applicant and another individual, whose rights are affected, the facts ought not to be evidence. We well know that such applications are made frequently *ex parte*. And if they are not entirely so, but the party affected appears and resists the statute, it is very questionable whether the facts recited ought to be evidence in a future contest. The legislature, in all its inquiring forms, by committees, make no issue, and in their discretion may or may not coerce the attendance of witnesses, or the production of records, and are frequently not bound by those rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopted, the principle that such facts are conclusive, or even *prima facie* evidence against private rights, and many individual controversies may be prejudged and drawn from the functions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are to make laws to operate on the future incidents, and not the decision of, or forestalling, rights accrued or vested under previous laws. Hence such a preamble as the present ought in such a controversy to be taken to answer the purpose for which it was intended, that is, an apology for the passage of the act, and the reason why the legislature so acted. Such a preamble is evidence that the facts were so represented to the legislature, and not that they are really true. The court, therefore, we conceive, did right in giving this instruction as asked. But, to return to the title, and conceding this point to be in favor of the defendants below, we cannot perceive that it will be of great advantage to them. For the enacting part of the last recited statute is positive and every way adequate in terms to vest the estate; and all the rest of the points decided by the court below rest upon the question, whether as the grants of the defendants had all issued previous to the death of Robertus S. Brandtz, and the consequent escheat thereupon to the government, the title when escheated enured to the benefit of these junior grantees, so that government could not grant it again, unless subject to these posterior grants, as contended for by the defendants, or whether the government took the estate as an entire

thing, unaffected by junior patents, and could grant it again, paying no regard to these patents, so as to place the last grantee completely in the shoes of the first? Upon this question the cause must essentially turn. For it is evident that the act of 1799 is fully equal to any grant the legislature could give on parchment issued through the instrumentality of her ministerial officers.

8. That an individual who has conveyed land without title, and afterwards acquired title, cannot set it up against his own deed, and that the title when acquired enures to the benefit of his grantee, is perfectly clear. In like manner, if he conveys, possessing title, and afterwards make a subsequent deed, and thereafter the estate first conveyed reverts to him, that the latter estate might thereby be rendered good, as contended in argument, may also be true. But this principle is adopted to punish his wrong, or compel him to do right. It was an act of turpitude to convey without title, or after he had parted with the estate, and he is therefore estopped from asserting his after acquired estate. In other words, the law will not let him show the truth, in alleging that he had nothing when he conveyed, and thereby the title, when acquired, is held for his defrauded grantee. This doctrine was fully recognized by the court in the case of *Massie v. Sebastian etc.*, 4 Bibb, 433. But does this rule apply to governments, and are they fettered by the same principle. In England, the will of the king is substituted for the will of the nation. Hence, it is said that the king can do no wrong. Not but the king as an individual may be as sinful as others, but as the will of the nation was centered in him, or rather as his will was that of the nation, he could do no wrong, because the sovereignty of the nation could not be thus impugned and arraigned. In a commonwealth like ours, the will of the majority expressed in the constitution and laws, and developing its acts by its public functionaries created by the people, is the sovereign. This will is personified, yet it is ideal, and on the subjects within its appropriate sphere, it is sovereign, and cannot be arraigned. Hence, wrong and fraud cannot be imputed to it, except so far as it violates the paramount will written in the form of a constitution, or the rules prescribed by the government of the Union, or its compacts with other governments. In other cases it cannot be accused of fraud, or subjected to estoppels, except so far as it may have subjected itself. No instance, it is believed, can be found of either estoppels being allowed to operate, or fraud to be

charged against the crown of England, or the commonwealths of America. The doctrine is they are not estopped. Hence, the supreme court of the United States insinuate, in the case of *Fletcher v. Peck*, 7 Cranch, 87, that fraud could not be averred or proved against the government of Georgia. Thus the reasons which rivet estoppels on individuals, fail when applied to the government. Who can be accused of practicing a fraud on these tenants by issuing to them a grant for land covered by the previous grant of Robertus S. Brandtz? Certainly not the unseen ideal commonwealth, who could not be conscious of it. Not the majority of the individuals who compose the government, and who were then, and may remain to this hour, ignorant that such a grant has issued. Not the register, surveyor, or governor, who signed the grant, or other public agents. If they did commit a fraud, they were not authorized by the government to do so, and government cannot be responsible for their acts, though for such acts they may be made responsible to government. They were only authorized to demark and grant the unappropriated lands, and if they granted those that were appropriated, they had no authority to do so. Besides, much of the doctrine of the estoppels, as applied to individuals, is based on their warranty. They are not permitted to disturb the inheritance which they have covenanted to keep secure. This base also fails, when an estoppel against government or inuring of its title for the benefit of a junior grantee, is attempted to be founded on it. For there is no warranty, either express or implied, in the grants of the government, nor is the government bound in any manner by the terms of its grant, to make good the land or any portion of its value.

The fact is that government passed laws for the purpose of appropriating her vacant lands and appointing public agents to effectuate that object. As observed at bar, in her grants she was quiescent. The grantee, a purchaser, was the active agent. The government acted entirely upon his information and suggestion, for the correctness of which he himself and not the government was responsible. She declared the terms on which she would part with her vacant lands. She pointed out no particular spot to the purchaser. This he was to choose, and this choice was confined to the vacant, and forbidden on appropriated, lands. This choice must be made not only at his peril; but if he chose otherwise, and induced the government to grant him appropriated lands by his suggestions to her agents,

he perpetrated all the fraud himself. He was allowed to purchase warrants and to locate them, provided, and on the express condition, that he did so on lands unappropriated. In that event only she engaged to complete the contract by the emanation of the grant. If he deceived himself and the government both, it does not lie in his mouth to say that he is a purchaser without notice, and that he has inveigled the government into a contract which he will assert against her for the purpose of imputing fraud or estopping her from the assertion of title if in the course of events the land should revert to her. If the purchaser then faithfully complied with the terms and conditions on which he was allowed to purchase, he acquired a title. If in this he failed, either through ignorance or design, the government never could have intended by her grants to subject herself to numerous ever-springing responsibilities, to imputations of fraud to the effect of estoppel, and indeed to a total inability for a thousand years to come to take back by escheat or forfeiture the real estate when by subsequent events it might return, unless she consented to hold it for the benefit of the junior obligations. There cannot then be, even in a moral point of view, so much wrong and injury done by the government as has been complained of at bar, in permitting her to take back, hold and re-grant the only valid title, without regard to the junior patents obtained for the land, even by an undesigned mistake. Of course, we conceive that the government did take the title as she originally held it, on the death of the elder patentee, and that it was competent for her to pass and vest it in Nicholas and Isaac Gouverneur, as Robertus S. Brandtz originally held it; and to the grants of the defendants below, well applies the maxim "*Quod ab initio non valet, in tractu temporis non convalescat.*" The doctrine now contended for is not without the support of authority.

In the case of *Wilcox v. Calloway*, 1 Wash. 38, in adjudicating upon the effect of a patent obtained for lost or forfeited lands, it is said that such patent "shall relate to the date of the original grant and avoid by priority all meane grants from the crown. This has often been so adjudged, in dispute about priority, between two patents with interfering bounds." The same court has decided that grants for such escheated or forfeited lands obtained under the laws appropriating the vacant lands of the commonwealth, were void, and that titles thereto could only be acquired through the sale of escheators, as directed by law. In the case of *Jones v. Jones*, 1 Call. 468, the

following language in the case of conflicting grants of the same character, is used: "It has been adjudged by this court that in cases of interfering bounds upon inclusive patents, lapse patents, and patents for surplus lands, the priority shall refer to the date of the old patent, always recited in the rule." Such appears to be the rule adopted in that state as appears by these and other adjudications. It has been contended at bar that this rule arose out of the peculiar expressions of the Virginia statute regulating such forfeitures, and providing for new grants. In these statutes we have discovered no peculiarity of expression, calculated to give origin to such a principle. But on the contrary, it is the application of a previous principle to peculiar forfeitures and escheats accruing from time to time by the laws of that government. We, therefore, conceive that it was competent for the commonwealth, after she had taken the land, *pro defectu hæredis*, from Brandtz the patentee, to regrant it as she took it, to the Gouverneurs without any bar or estoppel arising from the posterior grants of the defendants, even though those grants were obtained by an innocent mistake in the patentee, and total ignorance that the lands were appropriated which was no doubt the case. Of this mistake and ignorance, the patentee, and not the government, must bear the consequences.

The judgment must, therefore, be reversed with costs, the verdict set aside, and new proceedings be directed, not inconsistent with this opinion.

THE POWER OF AN ALIEN TO HOLD LAND was recognized by the national court, in the case of *Gouverneur's heirs v. Robertson*, reported in 11 Wheat. 332, 356, decided in 1826. Judge Johnson, delivering the opinion of the court, said: "That an alien can take by deed and can hold until office found must now be regarded as a positive rule of law, so well established, that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression." The disabilities attaching to alienage at the common law in respect to acquiring, holding and inheriting land, have been removed to a great extent by statute in the different states. A statement of these enactments, in brief, will be found in 1 Washb. Real Prop. sec. 49, (n) 1. In *Vermont State v. Boston etc. R. R. Co.*, 25 Vt. 433, the origin of the disability of aliens to take by inheritance, and the foundation of and proceedings in an inquest of office found were clearly reviewed, and applied to the condition of this country. The court arrived at the conclusion that the procedure, by way of escheat, to deprive an alien of his realty on the ground of alienage alone, would find little favor with a jury who "must be regarded as having to some extent the right to determine the applicability of such common law proceedings to our situation and circumstances."

In some of the states, where the doctrine still prevails that one cannot

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inherit through an alien, decisions have been pronounced rendering unnecessary any inquest or other proceeding in the nature of office found, to vest in the sovereignty the title to lands escheating for want of heirs: *Craze v. Reeder*, 21 Mich. 24; and *Sands v. Lyndham*, 27 Gratt. 291. In each of these cases it appeared that the resident alien died intestate. On the other hand, under the statute of Kentucky, the non-resident alien child of a resident alien may inherit in that state: *Eustache v. Roadquest*, 11 Bush, 42; so also is it held in *Goodrich v. Russell*, 42 N. Y. 177.

Other recent cases, passing upon the rights of aliens to hold and dispose of land under the laws of their respective states are *Settegast v. Schrimpf*, 35 Tex. 323; *State v. Killian*, 50 Mo. 80; *Halstead v. Board of Commissioners of Lake County*, 56 Ind. 363; *Eitenheimer v. Heffernan*, 66 Barb. 375; and *Golden Fleece Co. v. Cable Co.*, 12 Nev. 312. The last decision held that an alien who had not declared his intention to become a citizen, was not a qualified locator of mining ground, and could not hold either by actual occupation or location against one who connects himself with the government title by compliance with the mining laws.

JONES v. TEVIS.

[4 LITTELL, 26.]

PROCURING CHILD'S MARRIAGE WITHOUT PARENT'S CONSENT.—No action lies by a parent for procuring the marriage of his infant child without his consent.

ACTION FOR ENTICING AWAY INFANT.—A father, or if he be dead, the mother, may maintain an action for enticing away an infant, *per quod servitium amisit*; but such action must be trespass on the case, not trespass *vi et armis*.

PROOF OF INTEREST OF WITNESS.—A witness's declaration out of court is incompetent to prove his interest; but to exclude him his interest should be established by his oath on his *voir dire*, or by other competent evidence.

ERROR to the circuit court. The opinion states the case.

Breck and Gentry, for the plaintiffs in error.

Turner and Caperton, for the defendant in error.

By Court, BOYLE, C. J. This was an action upon the case, brought by Nancy Tevis against John Jones and Elias Gully. Two counts are laid in the declaration. The first charges the defendants with having unlawfully enticed the plaintiff's infant daughter by her late husband, then deceased, from her, whereby she lost her service. The second charges them with having unlawfully enticed away from her, her infant daughter, and with having fraudulently procured license, and induced her daughter, after her departure, to marry John Ford, against the will and consent of the plaintiff. The defendants pleaded the general

issue, and on the trial, after the evidence on the part of the plaintiff had been closed, the defendants offered to introduce Ford and wife as witnesses; but the plaintiff objected, on the ground that Ford was interested, and to support the objection, proved by a witness, the son and agent of the plaintiff in this case, that Ford had applied to the witness to get the suit compromised, and had stated to the witness that he had to pay the damages, or part of them, if any were recovered, and the court thereupon sustained the objection, and rejected Ford and wife as witnesses, to which the defendants excepted. A verdict and judgment were rendered for the plaintiff, to reverse which the defendants prosecute this writ of error.

The assignment of error involves several questions. The first we shall notice is, whether the injury alleged in the declaration is one for which an action will lie? Anciently, when military tenures existed in England, the father was entitled to what was called the value of the marriage of his son and heir, and the marrying of his son and heir without the father's consent, whereby, during the continuance of those tenures, he lost the value of his marriage, was, therefore, a civil injury, for which an action would lie. But by the abolition of military tenures this injury has ceased, together with the right upon which it was founded; and as this right never did exist as to his other children, it is clear that no action will now lie by the father for marrying any of his children without his consent. The declaration, however, in this case, charges the defendants not only with procuring the marriage of the plaintiff's daughter without her consent, but with enticing her daughter away from her, whereby she lost her service.

Whether this last is a civil injury, for which an action will lie, is more problematical. It is conceded on all hands, that prior to the abolition of military tenures, a father might maintain an action for the abduction of his son and heir at law; but there was a difference of opinion whether he could do so for the abduction of any other child besides the heir; some holding that he could not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away any of the children, because the parent had an interest in them all. This difference of opinion among the jurists of England was never settled by any direct adjudication of the courts of the country, even up to the time when Blackstone published his commentaries. He, however, thought that the action might be maintained

for the abduction of any of the children; and of the two, **this** appears to be the better opinion, being more consistent with analogy and with the reason of the law. If, as was supposed by those who maintained the opinion that an action would **not** lie for the abduction of any child, except the heir, the injury consisted in the loss of the value of the heir's marriage, the writ given in such case would have mentioned the loss of the value of the marriage, or some fact from which the loss would have been necessarily implied; but in the form of the writ given in Fitzherbert's N. Brevium, page 90, which was allowable by law in such case, there is no mention of the loss of the value of the marriage, nor of any fact from which it could be necessarily implied.

The writ goes for the abduction only, and there might be an abduction without a marriage, and of course the loss of the value of the marriage cannot be implied. The writ must, therefore, have been allowed upon some other ground than that of the abduction injuring the parent by the loss of the value of the heir's marriage, and we can conceive of no other ground upon which the writ could have been allowed by law, but that of the injury done to the right of the parent to the services of his child. If he has such a right, it must be a right to the services of all the children equally, and that he has such right, there can be no doubt. It is a right which grows necessarily out of the reciprocal relation of parent and child. The parent is bound to maintain, to protect and to educate his children, and in return he is entitled to their obedience and service. It is upon this principle he has been allowed to maintain an action for a loss of service, occasioned by beating or imprisoning his child, or by debauching and getting his daughter with child; and upon the same principle, he must have a right to recover for a loss of service occasioned by the abduction of his child. The right to maintain an action for injuries of this sort, no doubt, belongs exclusively to the father during his life; but after his death, the mother, being the only parent, is, in contemplation of law, guardian by nature to the children, in which relation she is bound to them by the same duties and has in them the same rights as the father during his life-time, unless there be some other guardian appointed: Hargrave, note 66 to Co. Lit. 74. The plaintiff in this case, after the marriage of her daughter, could have no right to her services; for the marriage, though procured by unlawful means, was, nevertheless, valid, and unquestionably gave to the husband of the daughter, from

the time it took place, a right to her company and services. But this is a matter which goes only in extenuation of the *quantum* of recovery, and does not extinguish the right to recover for the loss of services which had previously happened. The injury, therefore, is one for which an action will lie.

The next question involved in the assignment of error which we shall notice is, whether the action ought not to have been trespass, *vi et armis*, instead of trespass on the case. There might have been some doubt if the loss of service had been occasioned by taking away the daughter of the plaintiff by force, whether the action should not have been trespass *vi et armis*. Even in that case, however, there are strong reasons in favor of bringing it upon the case: 1 Tidd Pr. 6. But as no forcible taking is alleged here, and the loss of service appears to have been occasioned by enticing her away, the action upon the case is clearly proper. The only other question presented by the assignment of error, which we shall notice, grows out of the exception taken by the defendant, to the rejection by the circuit court, of Ford and wife, as witnesses. In this we think that court erred. The declaration of Ford out of court, and when not upon oath, that he had to pay the damages, or part of them, was but mere hearsay, and evidently incompetent to prove his interest. Ford should have been sworn on his *voir dire*, or other competent evidence of his interest should have been introduced, before he could have been excluded.

The judgment must be reversed, with costs, and the cause remanded for a new trial to be had, not inconsistent with this opinion.

See note to *Vaughan v. Rhodes*, 13 Am. Dec. 715, as to a parent's right of action for the taking away of his minor child.

HARRIS v. SIMPSON.

[4 LITTELL, 166.]

RECOGNIZANCE TAKEN BY SHERIFF OUT OF COUNTY. — A recognizance of special bail taken by a sheriff out of his county is extra-official and void, and such fact may be pleaded by the bail to a *scire facias* on the recognizance.

ERROR to the circuit court. The opinion states the case.

Caperton, for the plaintiff in error.

Turner, for the defendant in error.

By Court, Owsley, J. This was a *scire facias*, brought by Harris upon the following acknowledgment by Simpson, on a *capias ad respondendum*, which issued from the clerk's office of the Estill circuit court, in favor of Harris against Lewis Jones, and directed to the sheriff of Estill county: "I do hereby acknowledge myself special bail for the within named Lewis Jones, in the suit herein named, as witness my hand and seal this twenty-fourth of January, 1820." To the *scire facias* Simpson pleaded that judgment ought not to be rendered, and execution issued against him in this case, because he says that the original writ of *capias ad respondendum*, in favor of Harris, against Lewis Jones, in the *scire facias* mentioned, was directed to the sheriff of Estill county, and that the said sheriff, to wit, William Beatty, had said Lewis Jones in custody, in the town of Richmond, and county of Madison, on the day and date of said recognizance, and that he, the said Simpson, to wit, at Richmond, in Madison county, and not in Estill county, entered into said recognizance, and this he is ready to verify, etc. To this plea Harris demurred, and the demurrer being joined, judgment was rendered by the court in favor of Simpson. To reverse that judgment this writ of error has been prosecuted.

Unless, upon some technical rule of pleading, the defendant is estopped to allege the matter contained in his plea, there can be no serious doubt, but that the court below was correct in the judgment which it rendered against the plaintiff upon his demurrer. Wherever bail is required of a defendant, the sheriff may, no doubt, whilst in the regular discharge of his official functions, upon executing the writ, receive from the bail such an acknowledgment as that upon which the *scire facias* in this case is founded; and the acknowledgment when so received, will, under the act of the legislature, have the force of a recognizance of special bail: 1 Dig. L. K. 257. But to have the force of a recognizance, the acknowledgment must, we apprehend, be received by the sheriff whilst acting within the legitimate limits of his official duty. Beyond the limits of his county, a sheriff derives no authority from any writ to him directed; and the fact alluded to has conferred upon him no power to receive acknowledgments from special bail, beyond those limits. Whatever may, therefore, be done by a sheriff in executing a writ, on receiving thereon the acknowledgment of special bail, out of which he is sheriff, is extra-official and inoperative.

But the plea in this case charges the fact that the acknowl-

edgment upon which the *scire facias* is founded, was received by the sheriff out of the county of Estill, of which he was sheriff; and the question occurs, is it competent for the defendant to avail himself of that matter by way of defense to the *scire facias*? We apprehend it is. Were it even conceded to be incompetent for the defendant to traverse the return of the sheriff upon the writ in the original action, it would not thence follow that the plea in question should not be sustained, for instead of traversing the plea of the sheriff, the plea admits that the defendant made the acknowledgment contained on the original writ, and upon which the *scire facias* is founded, and by alleging matter foreign from the return, the plea attempts to avoid the operation of that acknowledgment as a recognizance of special bail.

Judgment affirmed, with costs.

RAIL BOND TAKEN WITHOUT AUTHORITY.—By the common law, a sheriff could not be compelled to take bail for one whom he had arrested upon meane process, and the only way in which the release of the prisoner could be effected was by the writ *de homine replegiando*. The sheriff might, however, take bail of his own accord, as the sole object of the arrest was to secure the appearance of the prisoner, and the command of the writ was obeyed, if the sheriff had him in court at the return day: Bac. Ab. tit. Sheriff (O); Sewell's Law of Sheriff, 161; Gwynne on Sheriffs, 120; Crocker on Sheriffs, sec. 607. But by statute 23 Hen. VI. c. 9, which has been adopted with various modifications, in many of the states, it was enacted, in substance, that sheriffs and other officers should let out of prison all persons by them arrested, or in their custody by force of any writ, bill, or warrant, in an action personal, or by cause of indictment, upon reasonable sureties, etc.; and all such officers were prohibited from taking any obligation for any cause aforesaid, or by color of their office, but only to themselves, of any person, nor by any person which shall be in their ward by course of the law, but by their name of office, and upon condition "that the said prisoner shall appear at the day contained in the said writ, bill or warrant, and in such places as the said writs, etc., shall require;" and any obligation taken by them in other form, by color of their offices, was declared void: Gwynne on Sheriffs, 120. Wherever such statutes have been enacted, it is clear that all bonds taken for or on behalf of persons in custody, *colore officii*, in any other manner than that prescribed by law, are void, not merely because they are unauthorized, but because they are positively prohibited: *Thompson v. Buck-lannon*, 2 J. J. Marsh. 416. In the absence of any such statute, it would seem that the sheriff would still have authority to take bail voluntarily in cases in which it was allowed at common law; and that an obligation voluntarily given in such a case would be valid as a common law bond. But such an authority could not, in any event, extend to a case where the prisoner was not lawfully in custody. Such was the principal case; for there, as is necessarily to be inferred from the statement, the prisoner was arrested, or at least held in custody, in a county in which the officer had no right to take or hold him. His release from such unlawful custody certainly could not be a valid consideration for any promise or undertaking whatever. And in

Bowker v. Lowell, 49 Me. 429, it was expressly decided that a bond given to secure a discharge from unlawful imprisonment was void. The same principle was applied in *Thompson v. Lockwood*, 15 John. 256, where it was held that a bond for gaol liberties taken upon the re-arrest of a prisoner upon civil process, after a voluntary escape, was void, such re-arrest being unlawful. On the other hand, in *Park v. State*, 4 Ga. 329, where the custody was lawful, it was held that a bond given to the sheriff voluntarily for the prisoner's appearance, in consideration of his release, was valid, although not expressly authorized by statute: See, also, *Johnson v. Erskine*, 9 Tex. 1. So it was held in *Archer v. Hart*, 5 Fla. 234, upon somewhat similar principles, that a bond given without authority of any statute, that certain negroes should appear and abide the decree of the court of last resort, concerning their freedom, being made between competent parties for a lawful purpose or for a purpose not in violation of any rule or policy of the law, was good as a voluntary bond. It is now provided by statute in Kentucky, in accordance with the doctrine laid down in the principal case, that a bond taken by a sheriff, unless authorized by law, is void: Gen. Stat. sec. 14, ch. 100. Under this statute it is held that superadding to the condition of the bond a provision not prescribed in the law, renders such bond void, as where the obligors undertake to perform the judgment of the court, when the statute merely requires a condition for the defendant's appearance: *Shuttleworth v. Levi*, 13 Bush, 195.

IN CRIMINAL CASES there seems to be some difference of opinion as to whether a bond taken for a prisoner's appearance, without authority of any statute, can be good as a common law bond. In *Williams v. Shelby*, 2 Ore. 144, it was held that although a voluntary bond for an injunction or replevin, or in any other proceeding of a civil nature might be valid as a common law obligation, although taken without the authority of a statute, this rule did not apply to criminal cases; and that, therefore, where a committing magistrate took a bail-bond for the appearance of a prisoner to answer to a criminal charge upon which he had been held, when there was no law authorizing such a bond to be taken, the bond was void, both as a statute bond and as a common law obligation. On the other hand, it was held in *State v. Cannon*, 34 Iowa, 322, that, where the magistrate of a different county from that in which a warrant of arrest upon a criminal charge was issued, took a bail-bond for the appearance of the prisoner arrested on such warrant, he having no authority by statute to take such bond, the bond, though void as a statutory bond, was nevertheless good at common law, the release of the prisoner being a sufficient consideration for its support. Day, J., delivering the opinion of the court, said: "But it is a bond voluntarily executed by the defendants, at the request of the accused, and for his benefit. Under it he has been discharged from custody. He has derived all the advantages which he could have had under a bond taken in the manner prescribed by the statute. And although he could not have required the acceptance of the bond, and his discharge thereunder, still having been released in consequence of the bond, there is no legal reason why the obligors thereon should not discharge their voluntarily assumed obligation."

The soundness of this doctrine is very questionable. Since the magistrate had no jurisdiction to admit to bail in such a case, the sheriff had no right to release his prisoner upon a bond so taken, and if he did so it was an escape; and since there is no distinction between voluntary and negligent escapes in criminal matters, it was the sheriff's duty immediately to retake the accused: Crocker on Sheriffs, sec. 127. Surely a breach of duty on the

part of the sheriff could not furnish a valid consideration for a bail-bond. It would certainly be contrary to the policy of the law to enforce an obligation founded upon such a consideration.

BONDS, GENERALLY, UNAUTHORIZED BY STATUTE.—"The general rule is, that a bond, whether required by statute or not, is good at common law, if entered into voluntarily, and for a valid consideration, and if not repugnant to the letter or policy of the law:" *Thompson v. Buckhannon*, 2 J. J. Marsh. 416. Thus, where an officer, without being required to do so by statute, voluntarily gives a bond for the faithful performance of his official duties, it is valid as a common law obligation: *United States v. Tingey*, 5 Pet. 129; *United States v. Bradley*, 10 Id. 361; *Tyler v. Hand*, 7 How. (U. S.) 581; *People v. Collins*, 7 Johnr. 554; *State v. Lynch*, 6 Blackf. 395; *Supervisors v. Coffenbury*, 1 Mich. 355; *Lane v. Kasey*, 1 Met. (Ky.) 410; *Hoboken v. Harrison*, 30 N. J. L. (1 Vr.) 73; *Sooy v. State*, 38 Id. 324. A contrary doctrine seems, however, to have been laid down in *Silver v. Governor*, 4 Blackf. 15. But the giving of the bond must be entirely voluntary; if it is exacted as a condition of the officer's being retained in his office, it is void: *United States v. Tingey*, 5 Pet. 129. And further, the bond, in order to be valid as a common law bond, must be given to the authority which has a right to exact the performance of the stipulated duty. Thus where a bond was taken to the state, without authority of a statute, for the faithful management of a fund belonging to a county, it was held that the bond was not good as a common law obligation, although it might have been otherwise if the money had belonged to the state: *Marshall v. State*, 8 Blackf. 162. It is to be noted, also, that the bond will be void if the officer, on whose behalf it is given, was appointed without authority: *Commonwealth v. Jackson*, 1 Leigh. 485; *Olds v. State*, 6 Blackf. 91.

The same general rule holds as to bonds given in the course of judicial proceedings. Such bonds will be deemed valid and obligatory as common law bonds, although not required by statute, or although not executed in the manner prescribed by statute, if they are given voluntarily between proper parties, for a valid consideration and not contrary to any statutory prohibition, or to any rule or policy of the law: *Classen v. Shaw*, 5 Watts, 468; *Winthrop v. Dockendorff*, 3 Greenl. 156; *Baker v. Haley*, 5 Id. 240; *Kavanaugh v. Saunders*, 8 Id. 422; *Spader v. Frost*, 4 Blackf. 190; *Dennard v. State*, 2 Ga. 137; *Gatherright v. Callaway*, 10 Mo. 663; *Freeman v. Davis*, 7 Mass. 200; *Burroughs v. Louder*, 8 Id. 373; *Holbrook v. Klenert*, 113 Id. 268; *Fournier v. Faggot*, 3 Scam. 347; *Pritchett v. People*, 1 Gilm. 525; *Wolfe v. McClure*, 79 Ill. 564. So it is settled in Louisiana that such a bond, although void as a "judicial bond," *Alexander v. Silbernagel*, 27 La. An. 557, is nevertheless good as a "conventional obligation:" *Todd v. Gorly*, 29 La. An. 496; *Lartigue v. Baldwin*, 5 Mart. (O. S.) 193. In Tennessee it seems to have been provided by statute that a good common law bond shall be regarded as a good statutory bond: *State v. Clark*, 1 Head, 369.

Here, also, the bond, to be valid at common law, must be entirely voluntary; if it is exacted *colore officii*, or as the condition for some act or proceeding to which the party would be entitled without giving the bond, it will be void for duress. Thus a bond exacted *colore officii*, and without lawful authority, from the complainant in a criminal proceeding, for the payment of the costs upon the acquittal of the prisoner, is void: *Germond v. People*, 1 Hill (N. Y.) 343. See, also, *Perry v. Hensley*, 14 B. Mon. 474. So a bond exacted by a judge from a tutor or guardian, without authority, as the condition for the performance of a judicial function: *Aucoin v. Guillot*, 10 La. An. 124. In

that case Slidell, C. J., thus stated the doctrine upon this subject: "The defendant is surety in an official bond given in favor of the district judge by a father and natural tutor, conditioned for the faithful administration of his trust. The judge had no lawful authority to require such bond from the father, and therefore the court correctly held the bond invalid. The maxim that as a man consents to bind himself so shall he be bound is not fairly applicable to such a judicial bond, which is not in legal contemplation purely voluntary, but is required by the judge from the parties as the condition for the exercise of a function. If he be entitled to such exercise without bond, its judicial *ex parte* exaction is illegal." There must also, as already stated, be a valid consideration to support such a bond as a common law obligation. Hence, if it is given to escape unlawful imprisonment, it is void for want of consideration. Thus, where a defendant in bastardy proceedings gave a bond for his appearance to answer the charge, and to abide the judgment of the court, in order to escape imprisonment, where no such bond was required by statute, and there was no authority to imprison, the bond was held void because there was no "valid consideration." *Byers v. Hutchinson*, 20 Ind. 47.

It is further to be observed that if the proceeding in which such voluntary bond is taken is *coram non judge* the bond is void. Thus, a forthcoming bond founded on a judgment which is void for want of jurisdiction, is itself void as well as all proceedings founded on it: *Buckingham v. Bailey*, 4 S. & M. (Miss.) 538. So an attachment bond taken by a justice in an action in which the amount exceeded his jurisdiction: *Benedict v. Bray*, 2 Cal. 251. So a replevin bond taken in a case where the court had not jurisdiction: *Sherry v. Foreman*, 6 Blackf. 56; *Caffrey v. Dudgeon*, 38 Ind. 512. On similar grounds, also, a bond given upon an appeal to a court which had no jurisdiction to entertain the appeal, was held void: *Parker v. Henderson*, 1 Ind. 62. For further illustrations of the principle, see *Blackman v. State*, 12 Ind. 556, and *Cassel v. Scott*, 17 Id. 514. But a bond given to release attached property where the attachment is merely irregular, is valid: *Onderdonk v. Voorhis*, 2 Robt. (N. Y.) 24. So a bond given on an appeal from a void award is not necessarily void: *Butler v. Wadley*, 15 Ind. 502. The principle upon which bonds taken in proceedings *coram non judge*, are held void is not only because there is no statutory authority for them, but, also, because they are without consideration.

FARMER v. SAMUEL.

[4 LITTELL, 187.]

PURCHASE OF LAND IN PARTNERSHIP.—Where two purchase land in equal partnership, although one pays more than half the money, he is not entitled to a conveyance of more than half the land.

A PARTNER PURCHASING PARTNERSHIP LAND UNDER EXECUTION against the partners, does not thereby extinguish his copartner's interest therein, but the purchase is no more than a bare payment.

POWERS OF COURT COMMISSIONERS.—Commissioners appointed in chancery, *pro hac vice*, may be empowered to ascertain and report boundaries, or any other matter of detail, ascertainable by calculation and resulting from matters in contest, to the ascertainment of which the attention of the parties has not been directed by the pleadings; and their report, if not excepted to, will be deemed correct.

REFERRING CONDITIONS OF DECREE TO CLERK.—Where a final decree is to be enforced on certain conditions, the court should see that the conditions are complied with, and it is erroneous to leave that question to the determination of the clerk.

ON RENDERING A DECREE FOR A CONVEYANCE, upon a payment or tender of money, the proper way is for the court to assign a day on, or before, which such payment or tender shall be made, reserving to itself the right of determining whether the condition has been complied with, and if so, to render a positive decree for the land; and it is erroneous to decree that, upon the defendant's refusing a tender of bank notes, the complainant may enter into bond approved by the clerk for the payment of the amount in currency of the union, and that thereupon the clerk may issue a writ of *habere facias possessionem*.

A VENDOR AND VENDEE HAVE MUTUAL LIENS, the former for the purchase-money still due, and the latter for that which has been paid, in case it is to be restored.

APPEAL from a decree of the circuit court. The opinion states the case.

J. J. Marshall and Bibb, for the appellants.

Hardin, for the appellees.

By Court, **MILLS, J.** John Arnold and John McCampbell purchased of William Bryan three hundred and forty-four acres of land, in partnership, to be divided equally, and a division line dividing it into two equal parts was run. McCampbell sold one hundred acres thereof to John Montgomery, and gave his bond for the conveyance thereof, and Montgomery took possession of the land, and afterwards sold and assigned the bond to James Samuel, who sold and assigned the same bond, and it passed through some two or three other hands, and then Samuel regained it by purchasing it back; and he then filed his bill against Arnold, alleging that Arnold had, by some address procured a conveyance to himself from Bryan, and had then sold and conveyed the said one hundred acres to Benjamin Farmer, who had full knowledge and notice of his equity. He made Farmer, Arnold and McCampbell defendants, and prayed a conveyance of the land, or if the land could not be obtained, the value thereof, either from Arnold or Farmer.

Arnold answered, admitting the joint purchase, and the division by survey of the land, but denies that he knows anything of the complainant's claim derived through Montgomery from McCampbell. He insists that McCampbell wholly failed in paying up any part of the money to Bryan; that he, Arnold, paid his part, and then a settlement took place, in which Bryan took a new bond for McCampbell's part, with Arnold as security,

and then McCampbell also failed in paying that bond until Bryan assigned it away, and the assignee brought suit, and recovered judgment; and then an execution thereon was levied on McCampbell's share of the land, and it was sold, and he, Arnold, became the purchaser, and paid the money; that he had given notice to McCampbell, and those who claimed under him, but none of them would pay the money; and alleges that before this, he had obtained the whole title from Bryan, as he had a right to do, and had sold the land to Farmer. Farmer also answered, denying any knowledge of any previous transactions between Bryan, Arnold and McCampbell, or of any claim derived from McCampbell, held by the complainant; admits his purchase and conveyance from Arnold of a tract of land, and denies that he had any knowledge, at the time of his purchase, that the complainant held any equity in the land, except that he had heard that the complainant once had, or pretended to have, some claim thereto. McCampbell made no answer. The circuit court decreed that Farmer should convey the land, after directing an account to be taken of the money which Arnold had paid, and of improvements and rents and profits, the latter of which exceeded the former. The decree was conditional, upon the complainant tendering or paying the excess which Arnold had paid to Bryan before the conveyance was made. No decree was rendered touching the rents and profits or improvements. From this decree Arnold and Farmer have appealed to this court.

It is insisted in the answers, and is now contended in this court, that the bill is defective, in not expressly charging that McCampbell had made his part of the payment to Bryan, and therefore it shows no equity on its face. It will readily be admitted that in a bill claiming the specific performance of a contract, it is necessary that the complainant should show in his bill that he had done all that was incumbent upon him to do, or to set forth some valid excuse for not having done it. And if this was a bill of that character, we should deem the allegation of payment indispensable; but this is not a bill of that kind. The bill charges a purchase in partnership, and is not claiming against Bryan the benefit of that purchase, but shows that Bryan has conveyed. The title of McCampbell, as against Arnold, did not depend so much on his payment, as on the joint purchase. Arnold, by paying more money than McCampbell, could not increase his interest in the land. Although such excessive payment might give him a cause of action for

the money, yet it could not take the land from McCampbell, unless express contract should so increase his interest, which is not pretended. Arnold, then, on acquiring the title from Bryan, must be considered as holding it as a trustee for McCampbell as to his moiety and not as a vendor to McCampbell, in which relation Bryan stood. All, then, that Arnold could expect, was that the chancellor would compel McCampbell, or his vendee, to do justice before he received it, by paying what money was paid by Arnold for McCampbell. It was competent, then, for Arnold to show that he had paid this excess; but it was not necessary for McCampbell, or his vendee, to allege that he, McCampbell, had paid his full proportion; for the fact of equal partnership, and not the fact of equal payment, gave McCampbell his equity against Arnold or his vendee.

It is also insisted that the proof is wholly insufficient to authorize relief against Farmer, especially as he requires full proof of everything. In this we also disagree with the appellant's counsel. Bryan proves the partnership-purchase and sundry payments by McCampbell, and the execution of the joint note for the last payment, and the conveyance to Arnold of the whole, which conveyance is also filed. It is also shown by at least two witnesses, that Farmer was informed of the true state of the case before he purchased. He, then, can stand in no better situation than Arnold. We attach no importance to the sale under execution and purchase by Arnold; for how Arnold, under an execution against himself and McCampbell, could become the purchaser of a title in himself, so as to extinguish the title of McCampbell, is what we do not understand. His purchase, then, is no more than a bare payment, the singular and solemn formality of the sheriff's sale notwithstanding.

It is further contended that the bill is defective in not pointing out the division line between McCampbell and Arnold, and particularly the boundaries of the bond, for a less quantity than the McCampbell moiety, given by McCampbell to Montgomery, and set up by the complainant. This bond requires the obligor to convey the land, to wit, the one hundred acres as laid off or surveyed by James F. Mitchell. It is true the bill does not describe how the partition line was run originally between McCampbell and Arnold, or set forth the boundaries of the one hundred acres demarked by Mitchell. Nor do these matters appear to be inserted in the pleadings of either party, and as far as appears, that matter is stirred for the first time in this court. That court appointed a commissioner to ascertain

the boundaries of, and fix the position of, the respective tracts, who reported these boundaries with a survey. And although that report was excepted to, yet no exception complained that the land was wrongfully located by the commissioner, which might easily have been done if the fact had been so.

If, then, the court could ascertain this matter by a commissioner, his report ought to have been excepted to, if erroneous, in this particular, before it can be here set aside. In other countries where courts of chancery exist, a master is appointed permanently by the government, to whom is committed the matters which cannot be performed by the chancellor without great loss of time. In the state of Virginia, anterior to our separation, and in this state since, the practice has been to appoint a commissioner *pro hac vice*, under an act of 1788 (1 Dig. L. K., 228), which provides that "it shall be lawful for the high court of chancery, in such cases as may require a report, which cannot be performed by the court without great delay to other business, to employ one or more commissioners, and cause a reasonable allowance to be taxed in the bill of costs." Whether the commissioner or commissioners so appointed can do any other than ministerial acts, and how far they may be authorized to hear and determine on evidence, as they have only a temporary appointment, is a question of some moment, never settled in the practice of this country; nor will it be necessary to settle it now, further than to inquire whether the acts done by the present commissioner could be delegated to him, and were such as he might perform under the appointment. We discover that courts of chancery in this country have been in the habit of confiding to such commissioners large powers. Sometimes they are appointed without any testimony showing anything to refer, and without any previous decision on questions of law or equity to guide the commissioners appointed. They are then to collect the proof and report an opinion upon it, and, of course, measurably to occupy the place of the chancellor. This is going further than the English chancery; for the rules of that court, as collected by Chancellor Kent, of New York, in the case of *Bemsen etc. v. Bemsen etc.*, 2 Johns. Ch. 495, are more restricted. Some of these will be recited: 1. That the parties should make their proofs as full, before the hearing in court, as the nature of the case requires or admits of, to the end that the supplementary proofs before the commissioner may be as limited as the rights and responsibilities of the parties will admit; 2. That orders of reference should specify the principles

on which the accounts are to be taken, or the inquiry proceed as far as the court shall have decided thereon, and that the examinations before the master should be limited to such matters, within the limits of the order, as the principles of the decree or order may render necessary; 3. That no witness in chief, examined before publication, nor the parties, ought to be examined before the master, or commissioner, without an order for that purpose, which order usually specifies the subject and the extent of the examination; and a similar order seems to be requisite, where a witness, once examined, is sought again to be examined before the master on the same matter.

These regulations seem to limit the powers confided to a master or commissioner more than the present practice; and we would here observe that the authority delegated to one temporary commissioner ought not to be extended beyond that of the regular master in England or New York. It is, however, correct to refer to matters of detail, such as can be ascertained by quantity and calculation, and also to fix and ascertain boundary, for which purpose surveyors, in our landed controversies, are substituted; and indeed, any matter which results from the matters in contest, and to the ascertainment of which the attention of the parties has not been directed by the pleadings. Such, peculiarly, was the case with the boundary and local situation of the land now in contest. The stress of the controversy appears to have rested on the existence of any equity in the plaintiff, instead of what was the proper situation to place it. It could not, therefore, be exceeding what might properly be committed to a commissioner, to direct him to ascertain the proper position of the land, after the court had determined that the plaintiff was entitled. If in this the commissioner erred, his acts were subject to revision, upon proper exception, when the error could have been corrected. We have been thus particular in reply to this point, because the report of the commissioner was excepted to in other respects, and the exceptions overruled, and the decision of this first point we deem an answer to all the exceptions taken.

The same commissioner was directed to ascertain the excess of money paid by Arnold beyond his part, and also the quantity of land which would belong to Campbell, in the division, after the one hundred acres were deducted. The commissioner reported the quantity of seventy-two acres, beyond the one hundred, and that the only balance paid by Arnold for McCampbell was the sum due by the execution of Bryan's assignee against

Arnold and McCampbell. A proportion of this sum, equal to what one hundred acres would require, out of the one hundred and seventy-two, was decreed to be paid by the complainant, before he received the conveyance. It is contended that McCampbell ought to have been charged with his full moiety; and then, that so much of that moiety ought to have been decreed to be paid, before conveyance, as would pay for the entire one hundred acres, and that the decree of the court gave too small a sum. This exception we deem untenable. It is proved by Bryan that McCampbell did make payments at different times, and there are sundry credits on the note given to Bryan. Arnold might have shown, to a cent, the excess which he paid beyond his moiety. As he showed that he made none, except that paid on the execution of Bryan's assignee, and the proof is that McCampbell made sundry payments, we conceive that the court did right in allowing Arnold no more than the sum given. So far, we conceive the decree of the court below correct, and if that court had taken the correct method of enforcing the principles adopted in the decree, we should not feel disposed to disturb it; but this is not the case. That court directed that Farmer, on the tender of the money, should convey the land; and that if he should refuse to receive it in notes of the Bank of Kentucky, or the Bank of the Commonwealth of Kentucky, and branches, the complainant might enter into bond in the clerk's office, with security approved by the clerk of the court, conditioned to pay the amount in the currency of the Union; and that, on executing such bond, or filing the receipt of Farmer, the clerk should issue a writ of *habere facias possessionem*; and thus the court finally disposed of the cause.

The impropriety of leaving a decree conditional, or to be enforced conditionally, and of leaving the question whether the condition is or is not complied with, to the parties themselves, or the clerk of the court, must be apparent to every reflecting mind. It was proper that the chancellor should compel the complainant to do equity, before he received it, by paying the money; but it was incumbent upon him to see it done. Who, in this instance, was to decide that the tender was sufficient, or that a payment was made? It was certainly improper to refer to the decision of the clerk the genuineness and validity of a receipt. In short, no decree but a positive one ought to be rendered, before the court dismisses the party without day. Great inconvenience must result to both parties by this decree. If the complainant tendered the money, and the defendant re-

fused to receive it or convey the land, what remedy had the complainant but a new suit? If the complainant never tendered the money, or entered into the bond, how long must the defendant be subject to the decree hanging over his head? How many years must he be subject to surrender his domicile at the call of the complainant?

Nor do we approve of the complainant being allowed to enter into bond with security, approved by the clerk, whatever may be the validity of the law allowing two years replevin, where specie is demanded. The clerk is authorized, by these laws, to take a recognizance and approve the security with ten days after court, or before the emanation of execution. But this is in the case of positive judgments or decrees. Here is no such judgment or decree, on which an execution could issue; so that the court could not delegate that power, and if it could, the bond could not have the force of a replevin bond. None such can have that force but those taken by the clerk in the form of a recognizance, or by a sheriff under an execution, or by commissioners under a decree or order of sale. It was, therefore, improper to compel the defendants to part with his lien upon the land, for a bond which must be coerced by another suit. The only proper way, therefore, was for the court to assign a day, on or before which the payment or tender of the money should be made, and then to reserve to itself the right of deciding whether the condition was complied with, and if it was, to render a positive decree for the land. As the decree must, for this cause, be reversed, the question presents itself, what decree ought to be rendered with regard to rents, profits and improvements? The difference between the rents and profits on one side, and improvements on the other, was about one hundred dollars in favor of the former, as reported by the commissioner. Testimony was taken, conducing to show that the improvements were too low and the rents too high, and the court gave no decree on this point, but left one to balance the other.

We approve the decision of that court in refusing to appoint commissioners under the occupying claimant law. We cannot consider the tenant a *bona fide* occupant, entitled to the provisions of that law, and he was certainly subject to all such rents and profits as could have been reasonably made upon the land; and, on the contrary, is entitled to lessen those rents and profits, so far as the lasting and valuable improvements extend, but no further. We do not view the evidence taken sufficient to set

aside the report. Some confidence is due to the decision of the commissioner. He does not appear to have been under any undue bias, or to have made a gross mistake in his estimates, although his report differs from the opinions of some of the witnesses. Opinions, we know, are various, and a mere difference is seldom counted sufficient to vitiate a report. Besides, the commissioner reported the rents from the time that Arnold got the possession as directed. The witnesses say, they count the rents for the time which Farmer held it, and for three years before, which they suppose to be as long as Arnold had it, without knowing the time. Of course, the opinions of both and the commissioner may be correct. We, therefore, conceive that the complainant is entitled to the excess of rents and profits beyond the improvements reported by the commissioner, and that the court do direct that sum, as well as the costs of the suit in the court below, to be taken from the money to be paid, and then, after reasonable time given for payment, or tender thereof, to decree the land positively to the complainant. And if, upon the tender of the money, the defendant in that court shall refuse to receive it, we would suggest the propriety of bringing the money into court, when the court shall decide on the tender, and give the final decree. We also approve of so much of the decision of the court below as directed the money to be paid or tendered to Farmer; for as he is the vendee of Arnold, and will lose the land, it will be proper that he should receive the money, as he holds by a warranty from Arnold, and will be bound to give a credit for that much, when he shall seek his recourse on that warranty.

One other point, in directing the decree, which ought to be rendered in the court below, need be noticed, and that is, what kind of a decree must be rendered, if the complainant in that court shall fail, on a reasonable time to be given, to pay the money with its interest, as fixed by that court? In such case, although he cannot obtain the land, he will be entitled to some redress. As he holds the bond of McCampbell, given to Montgomery, he must be entitled to recover as much thereon against McCampbell as Montgomery paid for the land, with its interest; and so much, to be ascertained by a commissioner or commissioners appointed for that purpose, or a jury, will form the measure of compensation which he can recover in this suit. He may be entitled to so much against Montgomery as he paid beyond what Montgomery paid McCampbell, if any such excess was paid, as the assignment to him is general. But Mont-

gomery is not before the court; and as the bond was assignable at law under the decisions of this court, he was not a necessary party, and, therefore, nothing can be determined in this suit, with regard to his claim against Montgomery; but the sum paid by Montgomery to McCampbell, must be the sum for which he is entitled to a decree against McCampbell.

But as McCampbell has paid for all the land, except what Arnold paid on the execution of the assignee of Bryan, in case Arnold or his vendee keeps the land, he will have a fair claim against Arnold for the sum paid by him; and as the complainant is the remote vendee of McCampbell, he ought, in this suit, to be allowed to recover so much against Arnold as McCampbell would, and that is the same proportion of the money paid by McCampbell to Bryan, with its interest, as one hundred acres bears to one hundred and seventy-two. What is more, as we have seen that as Arnold now stands in the shoes of Bryan, he has such a lien upon the title as will not permit a court of equity to strip him or his vendee of the title, without the receipt of what he has paid; so McCampbell, and consequently his vendee, the appellee, has also a lien upon the land for what was paid by McCampbell; for both the vendor and purchaser of lands have their mutual liens, the former for the purchase-money due to him, and the latter for what he has paid, in case it is to be restored to him. It will, therefore, be correct to charge the sum which Arnold is bound to pay, when ascertained as before directed, upon the land, and to subject the said one hundred acres to a sale for that amount, if it is not paid, as in case of other liens, and for so much as is thus charged upon the land, or recovered of Arnold, McCampbell will be entitled to a credit, in the decree obtained against him by the appellee, in case he fails to pay the balance of the price and keep the land.

The decree must, therefore, be reversed with costs, and the cause be remanded, with directions to the court below to enter a decree conformable with this opinion.

MORRISON v. McMILLAN.

[4 LITTELL, 210.]

GENERAL POWER TO SELL AND CONVEY.—Where town trustees are invested by a special statute with the title to land, and with a general authority to sell and convey, their deed *prima facie* implies a due execution of the power, notwithstanding the act of 1801; but where there is a naked power to convey under special restrictions, one claiming under such power must show a strict execution of it.

APPEAL from a judgment of the circuit court. The opinion states the case.

Hardin, for the appellant.

Tulbot and Todd, for the appellees.

By Court, OWSEY, J. This was an ejectment brought by Morrison in the court below to recover from McMillan etc. the possession of two lots, Nos. 13 and 14, in the town of Cynthia. The trial was had in that court on the general issue, and a verdict and judgment recovered by the defendants. The cause turns in this court on the question, whether or not the circuit court decided correctly in excluding from the jury a deed of conveyance which was introduced as evidence by the plaintiff. The deed purports to have been made by the trustees of the town to the plaintiff, and was rejected from going in evidence to the jury, on the ground that no evidence was introduced by the plaintiff to prove that the receipt of Robert Harrison, who was the former proprietor of the land on which the town is established, and on whose application the act establishing the town was passed, for the original purchase-money, was produced to the trustees, either at or before the time the deed was executed.

If at the time of executing the deed by the trustees their power to convey the title had been derived under a special authority to make deeds of conveyance to persons who shall produce to them Harrison's receipt for the purchase-money, there might be some force in the objection taken to the sufficiency of the deed. But such was not the nature of the authority under which the trustees acted in making the deed. By the act establishing the town, the title was vested in the trustees; and by a provision in that act contained, the trustees are expressly required to convey, not only to those persons who might have previously purchased from Harrison, but to all others who should thereafter purchase from them. Thus possessing power to sell and convey all, the authority of the trustees ought to be viewed in a light different from an authority derived under a naked power to convey under special and limited restrictions; and although, in the latter case, the person asserting the title under the power might be required to prove a strict compliance with the power, in the former case, the conveyance of the trustees, without the aid of extraneous evidence, *prima facie* implies everything to have been done which ought to be done to vest the title in the purchaser.

We know that by the fourth section of an act of 1801, 2 Lit. 459, the trustees of towns are expressly required to make deeds of conveyance to the purchasers of lots, or their assignees, upon their producing to them a receipt for the purchase-money from the original proprietor of the land upon which the town is established. But that provision of the act cannot be admitted to change the nature or degree of evidence necessary to be produced by a vendee asserting title under trustees possessing general power to sell and convey the title to all the lots of a town. The provision is directory to the trustees, and when clothed with general power to sell and convey, after the conveyance is made by them, the title will be presumed to have regularly passed to the vendee.

It results, therefore, that the deed introduced by the plaintiff was erroneously rejected by the court below, and that the judgment must, consequently, be reversed, with costs, and the cause remanded to that court, and further proceedings there had, not inconsistent with this opinion.

SHREVE v. GRIMES.

[4 LITTELL, 220.]

IMPROVEMENTS BY PURCHASER UNDER PAROL CONTRACT.—A purchaser of land under a parol contract, which is not enforceable, cannot recover on an implied assumpsit for improvements made on the land.

APPEAL from a judgment of the circuit court. The opinion states the case.

Hardin and Barry, for the appellant.

Haggin, for the appellee.

By Court, **MILLS, J.** Under a decree in favor of the now appellant, the mills and farm of a certain Thomas Caldwell were sold, and the appellant became the purchaser. Grimes, the present appellee, resided upon the estate at the time, claiming under some contract made with Caldwell, as a purchaser from him, but of what kind does not appear in this cause. Immediately after the purchase, Grimes agreed to become the tenant of the appellant, and to receive and hold possession under him, for one year; and accordingly an article of agreement was entered into and signed by the parties, in which the appellee stipulated to pay the rent of seven hundred and fifty dollars, and passed his notes for the same, payable by install-

ments of three, six, nine and twelve months, each being one hundred and eighty-seven dollars and fifty cents; and at the end of the term bound himself to restore the estate. The appellant stipulated to keep the appellee in possession, and to allow the appellee a credit for such necessary and lasting improvements or repairs as should be requisite in the opinion of the appellee, and be consented to by the appellant, during the term, to the amount of two hundred and twenty-six dollars and eighty cents, and no more on the last installments. At the close of this year a new lease was made for one year longer and reduced to writing, in the form of an article of agreement, signed by the parties, in which the same rent was stipulated, with a little variation as to the installments, and also an agreement that the last installment, which was two hundred dollars, might be expended "in repairs to said mills, provided that the necessary repairs to the mills might require that sum, within the year, in the opinion and judgment of both parties, or so much thereof as might be judiciously expended in repairs, in the judgment of both parties."

After the close of the year the appellee brought this action of assumpsit, and declared in two counts for work and labor, care, diligence, and materials expended on the mills and farm aforesaid, during the existence of the aforesaid leases, and exhibited and proved a large account from improvements done upon the premises, of nearly one thousand four hundred dollars value, and showed that the prices were reasonable. He also proved that while he was building a bridge across the mill-dam the appellant was there and dined with the appellee, and said in conversation at the time that the job was an arduous undertaking, but he had no doubt it would be useful; that the appellant lived in the neighborhood, and was at and passed the mills frequently, and as often conversed with the appellee while the work was doing; but the witnesses did not hear what was said. One of these occasions was while the appellee was clearing off land, which was an act directly contrary to the stipulations of the lease. One witness deposed that on the day of sale the commissioner appointed to execute the decree by selling the farm and mills, who is since dead, informed him that the appellant had bought the land and mills; but the appellee was to keep them, and had purchased them of the appellant by a parol agreement, and was to pay interest at the rate of ten per centum per annum, on the amount of the price, which was the same sum due from Caldwell to the appellant,

for which the land was sold, that is, five thousand dollars with some interest and costs, until he, the appellee, paid up the price. The witness further stated that in a conversation with the appellant, a few days afterwards, the precise expressions of which he could not recollect, his impression was, that he understood about the same thing from the appellant which he had learned from the commissioner. But some time afterwards he, the witness, was informed that the appellee held the mills under lease.

The appellant, on his part, introduced the leases, or two articles of agreement, which appeared to be in his own handwriting, except the signatures of the witnesses and the appellee. He proved that at the close of the first year, he settled with the appellee, and gave him credit for an account for improvements and repairs to the amount of two hundred and eleven dollars and seventy-five cents, being all the improvements then claimed and took his note for the balance of the rent then due, on which he, the appellee, afterwards confessed judgment, after a small credit was indorsed for grinding and sawing. This last witness, who was the appellant's son-in-law, heard no further claim for improvements at that time. The same witness further stated that at the time the second agreement or lease was entered into he went with the appellant to the appellee's house, when the appellant proposed to rent the mills another year. The appellee appeared to be angry, and observed that he might as well die by the sword as famine; but after a while he was reconciled, and entered into the second agreement. This was, in substance, all the evidence, except such as went either to increase or diminish, on the respective sides, the value of the improvements for which the suit was brought. The appellee, on this evidence, contended that there was a sale to him, verbally, of the farm and mills, known only to the commissioner; that the leases were only colorable to cover the interest of ten per centum on the price, while the appellant insisted on the transaction being as stated upon the face of the writings, and that there was no sale.

The counsel for the appellee moved the court to instruct the jury, that if they should find from the evidence that the appellee made the improvements claimed, under a verbal agreement for the purchase of the property, which had never been consummated, or reduced to writing, the appellee was entitled to a verdict for their value, so far as the improvements were necessary and valuable to the appellant, as proprietor of the

soil, and made with his privity, consent and approbation. This instruction was given by the court. The appellant moved the court, on his part, to instruct the jury that, if they were satisfied, from the evidence, that the contracts for renting the premises were reduced to writing, they could not find for the appellee in this form of action, unless the parties authorized the making of the improvements by some subsequent contract. This application was overruled by the court. After verdict, the appellant moved for a new trial, on the ground that the verdict was against the law and evidence of the case. This motion was also overruled; and the appellant having excepted to these opinions, and spread the evidence upon the record, has brought the whole case before this court by appeal, and in his assignment of error, complains of these decisions of the court below.

The principles involved in the instructions given by the court below, contains within it this simple inquiry, can a person who has bought and possesses land by a parol contract, which can not be enforced under our act to prevent frauds and perjuries, recover from his vendor the ameliorations and improvements made upon the land while he thus held it, in an action of assumpsit? It has already been settled by this court, in the case of *Keith v. Paton*, 1 Marsh. 23, that the consideration paid for land under such circumstances may be recovered back; and it seems evident that an action for money had and received, or detinue or trover for the property paid, or a *quantum meruit* for labor and services, paid as the price of the land, might be recovered back. But whether the ameliorations of the soil made in the mean time can be so recovered, is a different question. No doubt the party in some such cases is entitled to some remedy for improvements, and the opposite side for rents and profits, and this court has, in suits of chancery, directed one to be discounted against the other. But still this does not answer the question, whether any action at law can be brought; and if so, is this the proper one? The jurisdiction of a court of equity over a subject is not conclusive that no action at law will lie.

We have said that in some such cases recovery for ameliorations may be had. But we would not be understood as saying that such recovery could be had in every case; for if the purchaser should choose to live upon the land at such an uncertainty, and should make such amelioration, and should himself disaffirm the contract and never offer to fulfill it, and cast the improvements made upon the hands of his adversary, and thus

attempt to make him a debtor to that amount, against his consent, and without his default, the right to recover the value of the improvements, in such case, would be very problematical. At all events, if, in such case, they could be recovered, it could not be in an implied assumpsit, for there would be no ground to presume a promise or undertaking. If we take this case on a still broader ground, we should be at a loss to perceive the principle on which an action of assumpsit could be maintained. In the case of money or property paid to the vendor for the land itself, when he had only given his promise to convey, and should refuse to fulfill it, as such promise is of no avail in law, the price may be recovered back, on the principle that the consideration on which it was paid happens to fail. But with regard to ameliorations made under such circumstances, they are not designed for the use of the seller. He is not instrumental in causing them to be made, as he is in case of payment of the price. They may or may not be made, at the election of the purchaser; and in searching the principles over, for which an implied assumpsit will lie, we discover not one which would support the action. If the seller can be at all made liable for them, it must be on the principle of equity, that he ought not, when the improvements are delivered over to him, to be enriched by another's loss.

It is true an implied assumpsit will lie for work and labor done the defendant upon his request and assent, without any fixed price, or any express promise to pay; but the labor must be his, and the work be done for him, and not for another, and the work afterwards happen to become his, before the action can be sustained. We therefore conceive that whatever remedy the appellee may have, it is not by an implied assumpsit for work and labor, and that the court below consequently erred in instructing the jury that the appellee was entitled to recover, if the facts should be as he contended. If this question was not against the appellee, we should not be disposed to disturb the verdict, because the court overruled the application to instruct made by the appellant. The proposition made by him involved in it the principle that the writings controlled the contract and excluded the parol evidence of a verbal sale. It is true that writings cannot, in general, be affected or varied by parol proof; but it is the effect of the statutes against usury to alter this principle and let in the parol proof to show thereby that there was usury, although the writings negative the fact. As to the question of a new trial, it is unnecessary to say any-

thing, as it necessarily results from the opinion already expressed that the court below ought not to have permitted the verdict to stand.

The judgment must be reversed, with costs, and the verdict be set aside and the cause be remanded for new proceedings to be there had, not inconsistent with this opinion.

SMITH v. HORNBACK.

[4 LITTELL, 232.]

LIMITATIONS, WHEN JUDGMENT DOES NOT SUSPEND.—An unexecuted judgment in ejectment, without surrender of possession, does not stop the running of the statute of limitations. It merely gives a right of entry during the continuance of the demise laid in the declaration, but not afterwards.

AN ENTRY AFTER THE EXPIRATION OF THE DEMISE, with the defendant's oral consent, does not extinguish his right, and cannot operate to transfer his interest for a longer period than one year.

AN AGREEMENT PROCURED BY MISTAKE OR FRAUD is not void but voidable only.

CONSENT TO ENTRY THROUGH MISTAKE.—Where a defendant in a judgment in ejectment, through mistake of his rights, consents to the plaintiff's entry after expiration of the demise laid, such consent being binding until avoided, creates a tenancy at will, and upon the sudden determination of the tenancy, the tenant has a right to reap a crop already sown.

ERROR to the circuit court. The opinion states the case.

Hardin, for the plaintiff in error.

Tulbot, for the defendant in error.

By Court, BOYLE, C. J. This was an action of trespass *quare clausum fregit*. Not guilty was pleaded, with the leave to give the special matter in evidence. On the trial it appeared that a judgment in ejectment had been recovered many years ago against Daniel Hornback for the recovery of land including the place on which the trespass is alleged to have been committed; that the plaintiff in this case claims title by a conveyance from the lessor of the plaintiff in ejectment; that Daniel Hornback having died, Polly Hornback, one of the defendants in this case, and the widow of Daniel Hornback, together with others, as his representatives, claiming under the title of Reed, filed their bill with injunction to stay proceedings upon the judgment in ejectment; that the injunction had been dissolved as to the land on which the trespass is alleged to have been committed; that

Polly Hornback had afterwards assented to the plaintiff's taking possession thereof, who thereupon, by removing some old fencing and with some new rails, inclosed the place where the trespass is alleged to have been committed, and sowed it in grain; that Polly Hornback had a conveyance from Reed, under whose title she, and those under whom she claimed, had been in possession for more than twenty years prior to the time when the plaintiff took possession; and that shortly thereafter it has been discovered that the demise in the declaration in ejectment had expired before the plaintiff entered, the defendants, while the plaintiff's crop of grain was growing, entered upon the land inclosed by him, removed the fence to its old situation, and reaped the crop which the plaintiff had sowed.

On this state of the case, the court, on motion of the defendants, instructed the jury, that if Polly Hornback had been twenty years in possession before the plaintiff got possession, the right was in her, and she might peaceably enter upon the land and retake the possession and remove the fence, unless she had given the plaintiff permission to enter before that time; and that if she was ignorant at the time she assented to the plaintiff's possession, that the demise had expired, and of her right in consequence thereof, her assent should not bind her. To the giving of these instructions the plaintiff excepted, and a verdict and judgment having been rendered against him, he has brought the case to this court by a writ of error.

Of the correctness of the first branch of the instructions given by the circuit court, we have no doubt. The possession of land for twenty years operates, under the statute of limitations, not only to toll the right of entry of all adverse claimants, laboring under no disability, but to give to the party who has been so possessed, in case he should be ousted of the possession, a right to regain it by peacefully entering upon the land, or of recovering it in an action of ejectment. Nor does the judgment in ejectment in this case change the effect of the lapse of time; for the judgment could only give a right to enter during the continuance of the demise laid in the declaration, for which the judgment was rendered, and of course, after the demise had expired, the right to enter upon the land, in virtue of the judgment, no longer existed. But with respect to the second branch of the instructions given by the circuit court, we cannot accord with that court. The permission given by Polly Hornback to the plaintiff, to enter upon and occupy the land, certainly could not extinguish her right or transfer the freehold

to the plaintiff; for the permission, being merely verbal, could not, under the statute against frauds and perjuries, operate to transfer an interest for a longer term than for one year; but if her assent to his taking the possession of the land, and occupying it, had been given with a full knowledge of her right, it would have been binding upon her, and would have legalized his occupancy of the land for one year.

This seems, indeed, to be pre-supposed in the instruction given by the circuit court; for the instruction is predicated upon the hypothesis that she was ignorant of her right. But we cannot admit that an ignorance or mistake of her right can have the effect of rendering her assent entirely void, *ab initio*. An agreement, superinduced by mistake or fraud, is not void, but voidable only; and hence it is that the party who is prejudiced by such an agreement, may, at his election, affirm or avoid the agreement, and the other party cannot do so; whereas, if it were void, and not merely voidable, it could not be affirmed at the election of one party, and might be treated as a mere nullity by either. If, then, the defendant's agreement that the plaintiff should take possession and occupy the land, be not absolutely void, but voidable only, it cannot be said not to be binding upon her to any extent; for, until she elected to avoid it, it would remain binding upon both parties, and as she made no such election until he had entered upon the land, and inclosed and sowed it, he thereby became her tenant at will, which is equivalent to being a tenant for the year, and though she might determine her will, he could not, by the sudden determination of her will, during the year, be deprived of his right to reap the crop which he had sowed.

The judgment must be reversed, with costs, and the cause be remanded that the verdict may be set aside and a new trial had not inconsistent with this opinion.

MCGHEE v. ELLIS.

[4 LITTELL, 244.]

SELLING PROPERTY OF STRANGER ON EXECUTION.—Where a sheriff, on execution, sells the property of a stranger without the creditor's authority or knowledge, and the true owner afterwards recovers the property, the creditor is not liable at law or in equity to refund the purchaser his money; but the sheriff, himself, is liable; and the judgment-debtor, though not liable at law, unless he was accessory to the taking of the property, is liable in equity, because the purchaser has discharged so much of his debt.

RETURN BARS SECOND EXECUTION.—The sheriff's return, in such a case, that he has collected so much of the judgment or sold property to that amount and taken the purchaser's bond, cannot be set aside in equity, and is a perpetual bar to a second execution therefor.

APPEAL from the circuit court. The opinion states the case.

Bibb, for the plaintiff in error.

Crittenden, for the defendants in error.

By Court, *MILLS, J.* Under an execution in favor of McGhee, the plaintiff in error, against Micaiah Browning, the sheriff seized and sold a negro boy slave, as the property of Browning, and Ellis, the defendant in error, became the purchaser, at three months' credit, and executed his bond, with security, to McGhee for the price thereof in the usual form. Shortly afterwards, James Brown, who claimed the slave as his, by title paramount to that of Browning, brought his action for detinue for the slave against Ellis, and recovered. Ellis then exhibited his bill against both McGhee and Browning, with injunction against his bond for the purchase-money, praying a perpetual injunction, which the court granted by a final decree, to reverse which McGhee has prosecuted this writ of error. There can be no doubt, from the testimony in the cause, that the slave was the property of Brown, and that he had sent the slave to attend his daughter, Mrs. Browning, home, when she was on a visit at his house, under a promise from her that he should be restored in two weeks, he, Brown, living in a distant county. While the slave was at Browning's, the sheriff seized and sold him, and McGhee, who had placed his execution in the hands of the officer to pursue his legal remedy, gave no directions about the sale, and had no interference with it, and denies that he knew of the sale until after it was over.

The case thus stated presents the single question, whether a creditor or plaintiff in an execution is bound to refund to the purchaser the price of property sold under execution when the title proves defective; or, in other words, is a creditor who barely pursues his legal remedy, without controlling in any way the acts of the sheriff, bound by an implied warranty to make good the title of goods or chattels sold under the execution? It is somewhat singular, that sheriffs and sales under execution should exist in our codes of laws for so many centuries, and that wherever such sales exist, this question might, in the ordinary course of things, so frequently occur, and yet there should be so little said in the books on this subject; for,

in the search made by this court, which is not very inconsiderable, we have not been able to find a single adjudicated case on the point. We have, therefore, been led to take it up measurably on principle, and examine and adjudicate as the reason of the case may guide us. It would be hazarding too much to say, that all goods sold under execution passed without any warranty of title, and that, in every instance, the purchaser runs the risk of title, and can have no redress for the loss of his money. On the contrary, we have no doubt there is a responsibility somewhere to which he may resort, in case his title proves defective. If such liability exists, it must either be against the creditor, as the court below has decided in this case, or against the debtor, whose debt is discharged by the sale, or against the sheriff who seized and made the sale.

And, first, what is the situation of the debtor? By his own act, in creating the debt, and then refusing to discharge it, he is guilty of a wrong upon the creditor, which subjects him to legal process, and the sentence of the constituted authorities of this country, that he shall pay the debt. The sheriff, with the judicial process in his hand, seeks his estate, and perhaps acting honestly and innocently, takes by mistake the estate of another, and exposes it to sale. By the act of sale, and the return of the officer, his debt is discharged, his wrong against his creditor is purged, and the creditor is estopped by the return from again resorting to the judgment. To the judgment, and also the proceeding under the execution, both he and the creditor are parties, and while that remains in force, each is concluded by the return, as was decided by this court in the case of *Smith v. Hornback, Reed and others, ante*, 122. From this process and this mistaken act of the sheriff, the debtor receives a direct benefit; his debt is discharged, and the money of the purchaser is paid, laid out and expended for his benefit. It may, indeed, be said that the proceedings against him are *in invitum*, and that from that circumstance, his request that the money should be so laid out, cannot be presumed, and, therefore, that an action for money paid, laid out and expended, could not be sustained. To this it may be responded, that if the promise cannot be presumed, so that assumpsit may be maintained, he is under a strong moral claim, which may be enforced in equity.

When we examine the case of the sheriff, his attitude of responsibility is still more strong. He is bound to execute process of arrest on the body, at his peril. Hence it is said that

if he apprehends a wrong person, even though he is induced to do so by the deceit and falsehood of the person so apprehended, yet an action lies against him. In like manner he is bound to execute a *feri facias* correctly, and at his peril must know that the property seized belongs to the debtor. If he takes that of a stranger, even though he is directed to do so, he is responsible to that stranger in an action of trespass, trover or detinue. He is the agent of the law, placed between debtor and creditor, undertaking to levy the creditor's execution on nothing but the estate of the debtor. The purchaser then has the right to presume that he has done his duty correctly, and to infer from the office, the execution and the sale, that he buys a good title, and if he does not, that the sheriff has so far violated his duty as to deceive him. The exhibition and sale of property by an individual, as his own, is deemed sufficient in law to raise an implied warranty of title. Why, then, may not the acts of a sheriff who vends property which he represents to the world he has correctly seized and sold, be deemed equally sufficient to raise an implied warranty of title?

If we examine the case of a creditor, he is more remote from liability, in reason, than either the debtor or sheriff. Compelled by the refusal of the debtor to do him justice, he barely resorts to the means of coercion which the law furnishes him. Embarrassed and imbecile would be the remedy if he is construed to warrant all the estate of the debtor which the officer of the law shall seize and sell. The return of the execution satisfied extinguishes and bars the judgment. In this case he must be without further remedy. His judgment is discharged at law. He is compelled to take the bond of the purchaser in lieu of his judgment, and the return of such sale and bond taken releases the debtor, and a perpetual injunction in chancery has, in this case, precluded him from using that bond. The decree of the chancellor has not and cannot operate upon the record of the suit at common law, so as to remove this bar, and again let loose his execution. The two records are separate, and the power of the two courts distinct. It has been decided by this court in the case of *Bank v. Shain*, Litt., S. C. 451, that the chancellor cannot set aside a verdict and judgment at common law, but must operate upon the fears or the interest of the adverse party, by proceedings *in personam*, to procure his assent to the new trial. Nor can he have more power to reach the return of the sheriff, in a common law record, and wipe out the bar, and set the execution again into operation. It is

true, in this state, the powers of a court of law and chancery are blended in the same person, entered on the same record, and performed on the same judicial days; but yet the powers, to other purposes, must be kept as separate as if the tribunals were distinct and separate; and no more authority exists in the chancellor to deface the record of a common law suit than if that record belonged to a different court, and was in the keeping of another officer. Hence a perpetual injunction leaves the common law record in force; but for equitable reasons ties up the hands of the plaintiff in that court, from carrying it into effect, under pain of personal punishment.

It is said, however, that the consideration of the sale bond given by the creditor, has utterly failed, and this gives him a right to relief. It is true, a failure of consideration frequently gives right to relief, but that relief ought to be granted against the party from whom the consideration moved. If the creditor is allowed to collect and receive the amount of this bond, what did he give for it, certainly not the slave? He receives it as in lieu of his original debt, and as the consideration due to him for a counter consideration, which had previously passed from him to the debtor. For this bond he has surrendered his judgment and released the demand against the debtor, through the instrumentality of the sheriff, who has taken this bond to the creditor, and the law has compelled him to take it. He never had the negro, and never sold him, and, therefore, the purchaser, if the consideration has failed, must look to those who passed to him that deceptive consideration, or those for whose benefit it was passed, and not to him from whom it did not come.

Although we have remarked the silence of the English books on this subject, which might be expected frequently to occur, yet this silence is not entire, and one authority is found which supports this opinion: Dalton in his Office of Sheriff, p. 146, after treating of the high responsibilities of the sheriff when executing a *fiery facias* adds: "If the sheriff shall return his writ that he hath taken so much goods of the defendant's, and that he hath *denarios illos paratos ad reddendum* to the plaintiff," and the value be recovered of him by a stranger, "then," adds the author, "is the sheriff at a double mischief, for although the value of the goods be recovered against the sheriff or his officer, by the owner of the goods, yet the plaintiff in the action may, within the year after the execution done, have a *scire facias*, upon the judgment and return made by the sheriff, and thereby

shall compel the sheriff to bring the money into court; and after the year, the plaintiff may have an action of debt against the sheriff for it, if it be not otherwise ordered by the court where the judgment is depending." If this authority is to be taken as law, it is decisive of this question, and clearly shows that although the value of the goods sold under a *fiery facias*, be recovered of the plaintiff, yet the right of the plaintiff to the money is not thereby impaired.

If the contrary doctrine be true that the creditor is responsible for the validity of the title, he could not be entitled to the money, after that title had failed by a suit against the sheriff, which is the case put by the author. Nor do we conceive that the circumstance of a sale bond being taken, and the money being *in transitu*, and not in fact paid, varies the question. The bond of the purchaser and the return of the officer that he has sold and taken such bond, completely discharge the judgment and stand in lieu of it, and as between the creditor, is as complete a discharge, while it remains in force, as the return that the money was paid and ready to render. For these reasons the decree of the court below is deemed erroneous, and must be reversed. But Browning, the debtor, is now before the court, and the question arises, what redress shall be given against him.

We have said that the defendant in error has a claim in conscience against him, and the only doubt whether a decree ought or ought not to be rendered against him, is, because it may be contended that the remedy is at law. If any remedy exists at law, it cannot be an action on an implied warranty of title; for no warranty can be presumed to be made by him of the title of the slave, when he denies that he was instrumental in the sale, or that he ever represented the slave to be his, and there is no proof that he did. In such case, his bare defalcation, in permitting a judgment to exist against him unpaid, is the only part he has taken, and this agency is too remote to raise an implied warranty of title. The same may be said of the action of implied assumpsit for money paid, laid out and expended for his use. True, a promise in such action will be implied frequently, when the defendant has always resisted every acknowledgment that the money belongs to the plaintiff. But the true principle upon which the action is based, in such cases, is that the money was expended for the benefit of the defendant through his immediate instrumentality; and here the instrumentality employed by Browning was his bare failure in the non-payment of his debt, which is too remote to become the

base of an implied assumpsit, whatever his case might be, had he been shown to be immediately instrumental in causing the property of a stranger to be sold in payment of his debt.

But still it would be iniquity to say that he should avail himself of this advantage, and leave the innocent purchaser a loser; and it is in cases where right exists without remedy at law that a court of equity applies its helping hand. That court, when any legal advantage is gained by one, which he keeps, and that advantage has resulted to him by operation of law in lieu of a former claim or advantage over a third person, will relieve the case by applying the doctrine of substitution, and clothe him who is the loser, for the benefit of him who has gained, with the rights which such gainer first had against such third person. So, here, the creditor, McGhee, has gained his money against Ellis, in lieu of the judgment which he held against Browning, or so much as the price of the slave amounted to. It will, therefore, be equitable to place Ellis in the same attitude as to Browning, in which McGhee formerly stood, by giving him a decree to that amount against Browning. But as this does not appear to have been his object in filing his bill, and it can only be granted him under the prayer for general relief, and his main design seems to have been to get clear of the sale bond, from which he cannot be relieved, to force such a decree upon him may not only surprise him, but operate to his prejudice. We have seen that *prima facie*, the sheriff is liable, unless he shall have some defense which now cannot be adjudged of, as he is not before the court; and it may be to the interest of Ellis, owing to the circumstances of Browning, to dismiss his bill, and elect to proceed against the sheriff, and such a decree against Browning may bar him of that election; for it is a general rule that where a party has a right to elect to proceed against either of two persons for the same demand, and the liability of these two is precisely equal, a recovery of satisfaction against one extinguishes the right to proceed against the other, as it would be unjust to permit a double satisfaction for the same demand. It will, therefore, be proper for the court below, on the return of the cause, to permit Ellis then to make his election, whether to proceed to such a decree against Browning, or to dismiss his bill without costs, for the purpose of saving his recourse against the sheriff, if any he has.

We will barely remark, that so far as we have laid down any principle in this opinion, screening the creditor from any liability to make good property sold under execution, or the debtor

from becoming liable to an action at law in favor of the purchaser, for the price of the property sold, we would be understood as applying it to cases where either the creditor or debtor has been immediately instrumental in causing the property of a stranger to be sold, and thus been the cause of deceiving the purchaser. Such cases may stand on different ground from this, where the sheriff took his course without the direct agency of either, and the decision of them is reserved until they occur. But in this case a majority of the court, Judge Owsley dissenting, are of opinion that there is no responsibility resting on the creditor, and that he is entitled, as against the purchaser, to the benefit of the sale-bond with security.

The decree must, therefore, be reversed, with costs, and the cause be remanded, with directions to the court below to dissolve the injunction and dismiss the bill, as to McGhee, with damages and costs, and to permit the complainant in that court to take his decree against the defendant, Browning, or to discontinue his suit as to him, as he may choose.

PURCHASER UNDER EXECUTION GETTING NO TITLE.—The rule of *caveat emptor* undoubtedly applies to sales on execution, and the purchaser, therefore, takes the risk of the title where the sale is fairly conducted: *Smith v. Painter*, 9 Am. Dec. 344; *Friedly v. Scheetz*, 11 Id. 691, and note 699; *Davis v. Murray*, 12 Id. 661; *Richardson v. Wicker*, 74 N. C. 278. Hence the general rule unquestionably is, that if the title fails and there has been no misconduct or fraudulent concealment on the part of the officer or the parties, and no defect in the proceedings, the purchaser is without remedy. However, "in Kentucky, Indiana, Illinois and Texas, if the defendant in execution has no title, he may be compelled, by proceedings in equity, to reimburse the purchaser for the amount contributed, by means of the purchase, to the satisfaction of the judgment: *McGhee v. Ellis*, 4 Lit. 245; *Muir v. Craig*, 3 Blackf. 293; *Warner v. Helm*, 1 Gilm. 220; *Price v. Boyd*, 1 Dana, 436; *Hawkins v. Miller*, 26 Ind. 173; *Preston v. Harrison*, 9 Id. 1; *Jones v. Henry*, 3 Lit. 435; *Dunn v. Frazier*, 8 Blackf. 432; *Pennington v. Clifton*, 10 Ind. 172; *Richmond v. Marston*, 15 Id. 134; *Julian v. Beal*, 28 Id. 220; *Howard v. North*, 5 Tex. 290. But we think the better rule is, that, unless proceeding upon the ground of fraud, or misrepresentation, or some other well-known ground, a purchaser at an execution sale cannot, by any independent action, recover of either of the parties the amount of his bid: *Braham v. San Jose*, 24 Cal. 585; *Boggs v. Hargrave*, 16 Id. 559; *Salmond v. Price*, 13 Ohio, 368; *Laws v. Thompson*, 4 Jones, 104; *Halcombe v. Loudermill*, 3 Id. 491; *The Monte Allegre*, 9 Wheat. 616. Such an action is necessarily founded upon a mistake of law. The purchaser is sure to base his claim upon the fact that he mistook the legal effect of the proceedings in the case, or of the defendant's muniments of title. And it is well known that a mistake of law is not a sufficient foundation for relief at law nor in equity. The rule of *caveat emptor* unquestionably applies to judicial sales; and we know not how this rule can co-exist with another rule requiring one of the

parties to indemnify the purchaser in the event of a failure of the title. In a few of the states, purchasers have been given a statutory remedy: *C. C. P. of Cal. sec. 708; Halcombe v. Loudermilk*, 3 Jones, 491; *Chambers v. Cochran*, 18 Iowa, 150;" *Freeman on Executions*, sec. 352.

So far as the judgment-debtor is concerned, since the whole proceeding is *in invitum*, it is difficult to see why the purchaser, who has made an unfortunate investment, should have relief against him, unless he has been instrumental in procuring a sale of property to which he had no title. It is true that the purchaser's money goes to pay the defendant's debt, but as the purchaser makes the payment, not at the debtor's request or for his benefit, but with a view to his own personal profit, why should he stand in a more favorable situation than any other person who voluntarily pays another's debt without a previous request, or a subsequent promise of reimbursement? That the law will not, in ordinary cases of voluntary payments, imply both the request and the promise, see 1 *Parsons on Con.* 471.

As to the sheriff, while it is just that he should be held liable to the purchaser where, as in the principal case, he knowingly sells a stranger's property without disclosing the defect of title, there is no ground of relief against him where no such facts exist and where his conduct has been fair. It is true that there is an intimation in the principal case that there is an implied warranty of title in such sales, but this is mere *dictum*. The true foundation for the relief given against the sheriff in such cases is fraud and not an implied warranty. The principal case is put on the right ground on this point, in *Harrison v. Shanks*, 13 Bush. 620, where it was held that the sheriff was liable to the purchaser only upon a failure to disclose known defects in the title. Pryor, J., delivering the opinion of the court, thus expresses himself: "There is no implied warranty of title by the sheriff on a sale of property by him under execution, and the authorities relied on by counsel must be regarded as mere *dicta*. In the case of *McGhee v. Ellis*, 4 Litt. 244, Ellis, who had purchased the slave at a sale made by the sheriff, had to surrender the property to Brown, who was the real owner, and not the defendant in the execution. Ellis then instituted his action against McGhee, the execution creditor, and Micajah Browning, the execution debtor, to recover back the purchase-money. The plaintiff in the execution was held not to be liable, for the reason that he only pursued the legal remedy for the collection of the debt, and was in no manner instrumental in requiring the sheriff to make the levy. The defendant in the execution, however, was adjudged to be liable, for the reason that the purchaser under the execution had paid his debt. In discussing the questions involved in that case, and the necessity for affording the purchaser, who had lost the property, some remedy, in order to recover back his purchase-money, this court, although the sheriff was not a party to the action, proceeded to determine that the mere acts of the sheriff in seizing on and selling the property were sufficient to raise an implied warranty of title and to make the sheriff liable, as well as the defendant in the execution, whose debt has been satisfied by the purchaser. Other cases may be found in which the same doctrine is, in effect, announced by this court, but in no case was the proceeding by the purchaser, who had lost the property by a paramount title, against the sheriff on an implied warranty. Where the sheriff acts in good faith, or when he levies on and sells property under execution as the property of the debtor, having no sufficient reason to doubt the title, he cannot be held responsible, and the doctrine of *caveat emptor* applies; but when informed as to the existence of an adverse claim, or being in the possession of facts which should place one of ordinary prudence on in-

quiry in regard to the title, it is his duty to take a bond of indemnity to protect the purchaser as well as the claimant from any defect in the title; or, as to the purchaser, he should at least make known the defects or the existence of the adverse claim, if any existed, when he offers it for sale."

HOSKINS v. HELM.

[4 LITTELL, 309.]

EXECUTION ISSUED AFTER A YEAR is voidable as to the sheriff, but void as to the plaintiff, and will not justify an entry; and an attornment thereunder by the tenant in possession is void.

A TENANT CLAIMING TO HOLD ADVERSELY to his landlord, after the expiration of his term, is liable to a proceeding for forcible entry and detainer, such claim being evidence of a refusal to surrender possession.

APPEAL from the circuit court. The opinion states the case.
Talbot and Crittenden, for the appellant.

Hardin, for the appellee.

By Court, BOYLE, C. J. This was a warrant sued out by Helm, against Hoskins, for a forcible entry and detainer of land, lying in Shelby county. The jury in the country found Hoskins guilty, who traversed the inquest, and took the case to the circuit court, where an issue was joined upon the traverse. On the trial, Helm, who resides in Lincoln county, proved, by his agent, that on the fifth of February, 1820, he had leased the land in dispute to a certain Alexander, for that year, who was then in possession of the land as tenant of Booker, who had sold to Helm; that some time after the expiration of the lease, the agent of Helm had gone to the land, and finding Alexander had left it, he entered the house, and after remaining there from a quarter to half an hour, went away, leaving no person or property in the house, but intended to retain the possession for Helm, and remained in the neighborhood three or four days, with a view of getting some person to occupy the premises, when he heard that Hoskins had taken possession.

Hoskins, on his part, produced in evidence a copy of a judgment in ejectment, obtained on the demise of Boon, against Booker, at the July term, 1816, of the Shelby circuit court, and a *habere facias possessionem* issued thereon the third day of February, 1820, with a return thereon by the sheriff, that on the third of March, 1820, he had turned Booker out of possession, and delivered the same to Isham Talbot in his own right, and as attorney for the lessor of the plaintiff; and Hoskins also

proved that Talbot, on the day the sheriff returned that he had delivered the possession to him, leased the premises in dispute to Alexander, for the term of one year; and that after the expiration of the lease to Alexander, Talbot, by his agent, had leased the premises to Hoskins, and had him in possession. After the evidence was closed Hoskins moved the circuit court to instruct the jury, in substance: 1. That Helm had not such a possession as to entitle him to maintain the action; and, 2. That if the jury were satisfied that there had been no force used by Hoskins in taking the possession, or in subsequently detaining it from Helm, nor any demand of the possession on the part of Helm, that he could not maintain this action; but the court refused to give these instructions, but afterwards, at the instance of Hoskins, instructed the jury upon the whole case, that Helm could not maintain the action. The jury, however, found a verdict for Helm, and Hoskins moved the court for a new trial; but the court overruled the motion, to which Hoskins excepted, and a judgment having been rendered against him, he has appealed to this court.

The principal question is, whether the evidence was sufficient to entitle Helm to recover in this mode of proceeding. And this question mainly turns upon another, namely, whether the judgment and execution in ejectment read in evidence by Hoskins can have any effect in the case? For if they can have any effect, Talbot must be considered as having thereby lawfully gained a possession in his own right, or in the right of the lessor of the plaintiff; and it cannot be admitted that Talbot could have been disseised, or that Helm could have regained to himself a possession which would enable him to recover in this action by the transient entry of his agent into the house, and departure therefrom in the interval between the time when one tenant left and another took possession. But, on the other hand, if the judgment and execution in ejectment are to be treated as having no effect in the case, they cannot justify the entry of Talbot, and he must be considered as having gained the possession by the unlawful attornment of Alexander, the tenant of Helm; and in that case he and those claiming under him must hold the possession as Alexander held it, and be treated as the tenants of Helm. That the judgment and execution in ejectment can have no effect in the case, we apprehend, is clear. The judgment was rendered at the July term, 1816, and the execution did not issue until the third of February, 1820, above three years after the judgment had been

rendered, nor does it appear that any execution had previously issued; and it is well settled that a judgment, after a year and a day, without execution being issued thereon, becomes extinct, and that no execution can issue thereafter until it is revived by *scire facias*. The execution was therefore irregularly issued; and this irregularity, though it does not avoid the execution as to the sheriff, who may, nevertheless, justify under it, renders it void as to the plaintiff or his attorney, who is privy to the irregularity: see Tidd Pr., 936. The judgment, then, having become extinct by lapse of time, and the execution being void for irregularity, could not justify Talbot's entry, and he must be considered as acquiring and holding the possession by the attornment of Alexander, which not being made in pursuance of an efficient judgment is void under the act of assembly, and of course Talbot and Hoskins, who came in under him, should be treated as the tenants of Helm. Against a tenant after the expiration of his lease, the landlord may unquestionably maintain this mode of proceeding. It is true there must be a refusal on the part of the tenant to give up the possession; but where the tenant claims to hold the possession adversely, as was done in this case, it is sufficient evidence of a refusal.

The judgment must be affirmed with costs.

JOHNSTON v. GWATHMEY.

[4 LITTELL, 317.]

VENDOR'S LIEN ASSIGNABLE.—An assignee of notes for the purchase-money of land sold by the assignor, or of a judgment and execution therefor, takes under the assignment the vendor's lien upon the land.

THE ASSIGNEE DOES NOT WAIVE HIS LIEN by the mere fact that he may also have a lien upon land sold to the assignor.

EVIDENCE THAT NOTES ARE FOR PURCHASE-MONEY.—The fact that notes thus assigned are identical in times of payment with installments of purchase-money recited in the deed to be still due, is sufficient, *prima facie*, to show that they were part of the consideration of such deed.

IMPLIED NOTICE OF LIEN.—A subsequent purchaser of land subject to a vendor's lien is bound by implied, as well as actual, notice thereof; and he is chargeable with notice of such lien, if the conveyance to him refers to the deed to his vendor, which, though unrecorded, recites a part of the consideration as "secured to be paid" at a future time, these words not necessarily or properly importing personal security.

APPEAL from the circuit court. The opinion states the case.

Denny, for the appellant.

No attorney, *contra*.

By Court, **MILLS, J.** Gabriel J. Johnston sold and conveyed an out-lot of twenty acres in Louisville, to John Gwathmey. The purchase-money was payable by several installments. About two months afterwards, Gwathmey sold and conveyed the same lot to Arthur L. Campbell, for a valuable consideration. Gwathmey failed to pay the last two installments to G. J. Johnston, and confessed a judgment on one of these notes which was first due, and thereon an execution issued, and was returned "no property found," Gwathmey having failed and become insolvent. While this execution was in force, Gabriel J. Johnston assigned it to Ben. W. Johnston, and also sold and assigned to him the note of Gwathmey for the last installment. Ben. W. Johnston then filed his bill to enforce the lien for the purchase-money against the lot, and charges that Arthur L. Campbell had notice that part of the purchase-money was not paid, and seeks to subject the lot in his hands, and made G. J. Johnston, Gwathmey and Campbell, defendants. Gabriel J. Johnston answered, admitting these facts, and agreeing that Ben. W. Johnston was entitled to whatever lien then existed. Gwathmey answered, admitting his inability to pay the amount, and states that he gave no information or notice to Campbell, when he sold the lot of there being any part of the purchase-money due. Campbell also denies notice, and pleads and relies that he is an innocent purchaser for a valuable consideration, without notice; insists that Gwathmey was wealthy at that time, but has since failed; that Gabriel J. Johnston knew of his purchase from Gwathmey, but never gave him notice of any balance due, then or for months afterwards. The court below dismissed the bill, with costs, from which decree B. W. Johnston has appealed.

It is contended in the answer of Campbell that the appellant is only the assignee of these demands, and therefore cannot take advantage of the lien or security which G. J. Johnston held against the lot. As to the judgment and execution, they were not assignable in law, but were so in equity. The note, which had not been closed by judgment, was assignable by the act of assembly rendering such instruments assignable. If the assignment of the execution did not pass the lien, it must be owing to something which forbade it in the contract between G. J. Johnston and the appellant. No such objection appears in the writing; and Gabriel Johnston, whose business it was to make it, admits the appellant's right to it. Or it must be owing to the fact that the assignment *per se* destroyed the lien. For this we

see no good reason. G. J. Johnston could have maintained his bill, and no valid objection is perceived against this assignee of the judgment doing the same thing, and availing himself of all the advantages his assignor possessed by making him a party. As to the note assigned under the statute, the reason is equally strong. Nothing is withheld by the words of the law; therefore the passing of the principal took with it the incident; and it is more equitable to say that the assignor should be compelled to furnish all the facilities and securities which he held, to enable his assignee to recover the debt, than that they should be lost to the assignee by the assignment. The assignee takes the note under the express provisions of the act, subject to all the equity to which it was subject in the hands of the holder. As he takes it subject to all disadvantages, it is more consonant to the principles of reciprocity, to permit him to take and hold it subject to all the advantages which are attached to it. The objection cannot, therefore, prevail.

It is also insisted that this judgment and note were assigned in consideration of a lot sold by the appellant to G. J. Johnston, and that on that lot he held a lien, which he ought to be compelled to enforce instead of this. To this it may be answered, that were it conceded that the appellant, after taking these securities, or others, retained a lien on his lot sold, (which is by no means clear) it would not follow that it was not competent for G. J. Johnston to transfer to him the debts which he held on others, in payment, and that the appellant could not resort to any legitimate means in his power, to recover those debts before he resorted to his lien. Besides, although it may be probable, yet it is by no means certain, from the proof, that the note and judgment were assigned in payment for a lot. It is further urged that it does not appear that the notes in question were given for the purchase-money of the lot sold to Gwathmey. To this it may be answered that besides the presumption which might arise from there being no other dealings shown between Gwathmey and G. J. Johnston, the deed made by the latter to the former not only agrees with the notes in date, but recites the installments minutely, and the two last agree precisely with the notes, both in sums and times of payment; a coincidence which could not have happened between any other distinct transactions, and which is always held sufficient to show that one is the consideration of the other.

The question then must exclusively turn upon the inquiry, whether Campbell really had notice of the purchase-money not

being paid. That he had express or actual notice cannot be pretended; for there is no proof of such notice in the record. But whether he is not bound by implied notice, is a question of more seriousness. This doctrine of implied notice is strictly enforced in equity, sometimes to an extent that seems to impose individual hardship. Such presumptive notice is a conclusion of law (where by the exercise of ordinary diligence, without any extraordinary precaution, a man cannot but acquire a knowledge of the fact charged), that he has notice without any proof of actual notice. The principle applies where a purchaser cannot make out a title, but by a deed which leads him to a fact material to it, he will not be deemed a purchaser without notice of that fact, but will be presumed conscious of that fact; for it is deemed gross neglect, if he sought not after it. Thus in *Draper's Company v. Yardly*, 2 Ver. 662, parties who claimed under an individual by mortgage and a rent charge, although he had levied a fine with five years non-claim, were held bound by notice, to satisfy a legacy out of an estate, because that individual first took the estate under the will granting the legacy, and that will was held to be implied notice to all purchasers under him. So, in *Dutch v. Kent*, 1 Ver. 260, 309, parties claiming as innocent purchasers, two or three grades or links beyond a patent which created a trust, were held bound by that grant, on the ground that they ought to have noticed it at their peril. So in *Moore v. Bennett*, a person purchasing from one who claimed by deed revocable by will, subsequent purchasers were held to have notice of the will, as well as the power of revocation in the deed; for no conveyance could be made to a purchaser but by the deed, which contained the power of revocation, and alluded to the will. This case will be found to be analogous in principle to the present: See Cha. Ca. 246; Pow. on Mort. 571.

In the case now under consideration, the conveyance from Gabriel J. Johnston to Gwathmey was executed on the seventeenth of September, 1817, and recites the consideration in the following words: "For, and in consideration of, the sum of twenty-five hundred dollars, secured to be paid by him, the said Gwathmey, at the following periods, to wit, four hundred dollars on the third day of March, 1818; four hundred dollars on the third day of June next, 1818; four hundred dollars on the third day of September next, 1818; six hundred and fifty dollars on the third of September, 1819; and six hundred and fifty dollars on the third day of September, 1820, the re-

ceipt of which security is hereby acknowledged." On the eleventh November, 1817, not two months after the execution of this conveyance, Gwathmey sold and conveyed the lot to Campbell. That conveyance recites the consideration as paid, and further declares that it is "the same lot that was conveyed to the said John Gwathmey by Gabriel Jones Johnston and Elizabeth, his wife, by indenture and deed bearing date the seventeenth day of September, 1817, which *prima facie* amounts to express notice.

Aware of the effect of this recital, Campbell, in his answer, has reasoned against his being affected by it, as well as denied every fact touching the deed, as it behooved him to do. He contends that the words "secured," and "security," employed in the deed of Gabriel J. Johnston, mean that some personal security was given, which removed the lien, and that in this sense he had a right to take it, if he must notice the contents of this deed. This is not the literal and proper meaning of the expressions. The words properly mean that bonds, or notes, or some writings, were taken, and personal security would be better designated by the word surety than security. It is true, we often, in common parlance, say bond and security when we intend to communicate the idea that some other or others are bound, when the bond itself is security. Such, indeed, is often the legislative language employed in our statutes; but the words neither necessarily nor properly bear such meaning, and one could not read them, without being put on the inquiry whether the lien was or was not removed, which the purchase-money necessarily created; for the security is received from Gwathmey alone.

It is also denied in the answers, both of Campbell and Gwathmey, that Campbell ever saw this conveyance, and Campbell alleges that he rested on the word of Gwathmey, that he had a conveyance, and never examined it, and that the deed was not of record when he purchased. It is true, by the certificate of the clerk, this deed of G. J. Johnston to Gwathmey was not put on record until about fifteen days after Campbell's purchase; but the authorities cited and the principles adopted by them do not rest upon the registry of the previous titles; for the effect is the same, if the deeds are not recorded at all, if the party to be affected by notice claims under, and cannot make out title without them. As to his not having examined the deed, the principle contended for considers that as done which ought to be done, and which no prudent or cautious man

would omit doing. It operates as a *quasi* estoppel, and binds a man by an equity apparent in the title by which he holds, and does not permit him to claim under it, when for him, and against it when it operates against him.

We therefore conceive that the notice that not one cent of the purchase-money was paid is complete on the face of this deed, under which Campbell purchased, and that he is bound by that notice whether he did or did not possess himself of it, when it was so accessible that he could scarcely avoid it. It is in this and the like cases that the maxim, *caveat emptor*, emphatically applies; and it is reasonable and necessary to bind a party by his own title. The principle may operate with some hardship in a few cases; but as Chancellor Kent observed with regard to the *lis pendens*, a doctrine of similar operation on subsequent purchasers, "it is one of the cases in which private mischief must yield to general convenience." A seller who has taken so much pains, as is done here, to place notice in the road of all who should thereafter attempt to purchase, so that they must stumble over it, if they would not watch their feet, ought not to be deprived of the lien to which the law entitles him. The lien ought, therefore, to be enforced against the lot; and if not discharged on reasonable time given for that purpose in the court below, the lot, or so much thereof as may be necessary, must be exposed to sale, to raise the balance of the purchase-money due and claimed in the bill.

The decree must, therefore, be reversed, with costs, against Campbell and Gwathmey, and the cause be remanded to the court below, that a decree may be there rendered according to this opinion.

ASSIGNABILITY OF VENDOR'S LIEN.—See, on this subject, the note to *Lagow v. Badollet*, 12 Am. Dec. 262.

EWING v. HANDLEY.

[4 LITTELL, 346.]

EXECUTION ON JUDGMENT AGAINST ADMINISTRATOR.—On a judgment against an administrator (upon a plea of no assets) to be levied out of goods and chattels thereafter coming to his hands, execution cannot issue without a *scire facias*.

A BILL FOR THE DISCOVERY OF ASSETS will lie in such a case, and is indispensable where property has been fraudulently conveyed by the intestate, preventing a recovery by the administrator, who cannot sue therefor under the statute of frauds.

DISMISSAL OF BILL NOT SET ASIDE, WHEN.—A dismissal of a bill as to certain defendants, by the complainant, will not be set aside on the application of those defendants, where their interests are sufficiently protected without it.

VERDICT AND JUDGMENT AGAINST ADMINISTRATORS are *prima facie* evidence against heirs, so far as the personalty is concerned. Hence they cannot, in equity, have such judgment reduced as being for too much, except where the administrators could do so.

AN INTEREST IN CHATTELS VESTED IN A WIFE before or during coverture belongs to the husband, if he survives, and passes to his administrator, notwithstanding a particular estate therein undetermined which prevents his acquiring possession in her life-time.

UNDER A DEVISE TO "CHILDREN," grand-children may take if there are no children.

EXECUTION OF POWER IN DEVISE.—Where slaves were devised to a husband and wife for life with power to dispose of them as they pleased among their children during their lives or at death, it was held that a continued loan for more than five years to one of the children rendered the slaves liable for such child's debts the same as if the power had been formally executed by gift.

POSSESSION UNDER UNRECORDED LOAN.—To avoid the effect of continued possession under an unrecorded loan, the slaves must be returned to the owner so publicly and openly as to leave no doubt as to the change of possession.

DEFECTIVE DECREE AGAINST ADMINISTRATOR.—A decree against an administrator, merely declaring slaves not in his possession, assets in his hands, but not subjecting them to sale to discharge the debt or directing those, in whose possession they are, to surrender them, is defective.

RELEASE BY ONE EXECUTOR of a money demand is good, but where there is a contract with the testator for land or money in the alternative, the power of one executor to release depends on the impossibility of obtaining the land.

A PETITION TO DISMISS, BY ONE EXECUTOR, should not be allowed, where the other objects, and there are questions involved which should not be decided on motion.

IMPROVEMENTS BY BONA FIDE OCCUPANT.—A *bona fide* occupant is entitled to charge for improvements exceeding the rent.

IMPROVEMENTS BY A VENDEE IN POSSESSION, who has paid the purchase-money, should be allowed for, although they exceed the rents and profits, if the vendor disaffirms the contract and refuses to refund the purchase-money without suit; but the vendee should not be allowed for improvements made after obtaining judgment for the price paid; and rents should commence at that time.

IMPROVEMENTS BY OCCUPANT GENERALLY.—The general equity rule is that an occupant of land is regarded as the employee of the real owner, and not as his tenant, in clearing and fencing, and rendering it fit for cultivation; but after it is fit for cultivation, the accounts between the owner and occupant should be adjusted on the principles governing landlord and tenant; but many exceptions should be made.

APPEAL from the circuit court. The opinion states the case.

O. A. Wickliffe and M. D. Hardin, for the appellants.

Bibb and B. Hardin, for the appellees.

By Court, MILLS, J. On the twenty-eighth of November, 1789, Charles Ewing contracted to sell to James Handley two hundred and fifty acres of land, then demarked, and executed his bond with a penalty, binding both himself and his heirs, conditioned to convey the said land "by a sure and sufficient deed in fee-simple, as soon as a patent could with convenience be obtained for the same; and also to keep the said Handley in peaceable possession of the same." Handley afterwards took possession thereof, and settled his son thereon, and gave him only a verbal grant, permitting him to hold it as a *quasi tenant* at will, and his son still resides thereon.

Many years afterwards, Ewing, being embarrassed, departed from that section of the country, never having made a conveyance, and in 1808, Handley commenced a suit at law upon said bond, assigning as a breach the non-conveyance of the land. After this suit was prepared for trial, Ewing died. A *scire facias* to revive it was issued against Nathaniel Wickliffe, his administrator, who pleaded that no assets had ever come to his hand. A verdict was found for one thousand dollars in damages, and a judgment rendered against the administrator for the amount, to be levied of the goods and chattels which were of said decedent at the time of his death, and which should thereafter come to the hands of his administrator to be administered. In the year 1811, James Handley filed this bill in the Nelson circuit court against the heirs and administrator of said Ewing, charging that since the judgment the administrator had received assets and divers sums of money, which he could not prove without a disclosure, and which he claims in satisfaction of his judgment. He also alleges that at the time he contracted with Ewing, he, Ewing, was possessed of a negro woman, Hannah, as of his own proper estate, who had now nine children, and that said Ewing still possessed her as his own, until the death of his first wife, about the year 1804, and for some years afterwards, when Ewing, to avoid a prosecution, left that section of the country, and then Charles Wickliffe, the father-in-law of Ewing, being the father of his deceased wife, set up claim to these slaves as his, and that he had only lent them to his daughter after their marriage, which took place in 1786, and by some address, got possession of and still retains them; and that the administrator of Ewing, to favor the children of his de-

ceased sister, being a son of the said Charles Wickliffe, or having a hope to inherit them as part of his father's estate, would not take possession of them or claim or recover them as part of the estate of the decedent, to which they rightfully belonged, lest the creditors should get them. He also charges that Ewing died possessed of considerable real estate, of which he prays a discovery from the heirs, and alleges that the administrator has filed his bill against the heirs to subject it for other debts which he claimed; but that his, the said Handley's, was of superior dignity, and claims that it should be first satisfied. He made the administrator and heirs of Ewing, and the said Charles Wickliffe, defendants, and prays the satisfaction of his judgment and for general relief.

The heirs answered, setting out a list of lands as given in by Ewing for taxes, but exhibit no title papers. They contend that Handley took possession of the land from their ancestor, and by his son still holds, and will not surrender it to them, and that before he should have the aid of a court of equity to enforce his claim, he ought to be compelled to do equity, by surrendering the possession and accounting for rents. They aver that the verdict and judgment of Handley were far too high, being the value of the land at the time of rendering the verdict, instead of the value paid when purchased, which was far less, and which they pray Handley may be compelled to disclose in response to their answer, which they make a cross-bill; and they insist that as they were not parties to the judgment against the administrator, they have now a right to contest it, and that the administrator was absent at the trial at law, and that Handley caused a fraudulent representation of value to be given to the jury. They allege that the two hundred and fifty acres sold to Handley by their ancestor were located in the name of their ancestor's relative; and that their ancestor was entitled to half for location, by the custom of the country, and also by a written contract between their ancestor and his relative; and that having located other claims in the division, the whole tract of one thousand acres, of which the two hundred and fifty acres sold to Handley were part, fell to their ancestor; but that the written contract was so lost or mislaid that they could not find it. They aver that the relative of their ancestor, in whose name the claim is, is dead, and that his heirs are unknown to them; and they make them defendants as unknown heirs, and pray that they may be compelled to convey to them, and that Handley may be compelled to accept

a title from them, which they are willing to give with any security, or that he may be compelled to surrender the possession, if he will not take the title.

Charles Wickliffe answered the bill and states, including what is set forth in his original and amended answers, that he held Hannah and her children under the will of Martin Hardin, his wife's father, recorded in Virginia in 1780, and written in 1799, only two sections of which need be recited as having any bearing on this controversy, to wit: "Item, I give and bequeath to my daughter, Mary Wickliffe, all that personal estate that I lent her soon after marriage, negroes excepted; them I lend to her and her husband, Robert Wickliffe, during their natural lives. But if the said Robin Wickliffe should sell, mortgage or convey away any of the said slaves, or any part of the said slaves, in order to defraud the right heirs of them, the said negroes, to wit: Slate, James, Hester, Sarah, and Nan, or their further increase, then I empower my executors to sue and recover such slave or slaves so sold, mortgaged, or conveyed away, for the use of the right heirs, and to take the remainder out of his hands. But if my daughter, Mary Wickliffe, should have a child, or children, I give the said negroes to that child, or children, to be equally divided amongst them; and for want of such issue I give them to Charles and Lydia Wickliffe's children, to be equally divided amongst them. Also, I give my daughter, Mary Wickliffe, twenty pounds lawful money of Virginia. Item: I give and bequeath unto my daughter, Lydia Wickliffe, twenty pounds, current money of Virginia, and no more. Item: I leave my daughter, Lydia Wickliffe, and her husband, Charles Wickliffe, four negroes, that they now have in their possession, to wit, one negro woman named Frank, commonly called Fanny, and her two children, also, one negro girl named Anna, and her further increase, during their natural lives. I also give the said negroes to Charles and Lydia Wickliffe's children, to be divided discretionally among them, as the said Charles Wickliffe and Lydia, his wife, shall think fit, and at what times." He, said Charles Wickliffe, states that his daughter Ewing was married in 1786, and that he was absent in Virginia in 1787, and his wife Lydia Wickliffe, who is still living, sent Hannah, who was the oldest child of Fanny, named in the will, to aid her daughter, Ewing, which he disapproved of, on his return home, and in 1791, he reclaimed the possession of Hannah, and sent others in her place; and then returned Hannah on loan; but never at any time permitted her to stay so

long without reclaiming her, as to give Ewing a title by five years' possession, or to subject her to the debts of Ewing by the same length of time; and insists that he and his wife never did assign her or her increase to Ewing or his wife, under the will of Martin Hardin; and alleges that he permitted her to stay at Ewing's after the death of his daughter, Ewing's wife, barely to take care of his grandchild, for whom he then and yet designed these slaves.

The administrator of Ewing demurred to the bill, after, by way of answer, denying fraud in general terms. The court overruled this demurrer, and directed an answer. In his answer, he alleges that the estate of Ewing was indebted to him for money paid as the security of Ewing, and to recover that he had filed his bill against the heirs. He admits that he was warned by the *scire facias* of the pendency of the suit at law against him, as administrator of Ewing, and that the suit was at so great a distance from him, in Henderson county, that he wrote to a lawyer, and did not attend himself, and was unacquainted with the transaction; that Handley procured a verdict for too great a sum, by proving the then value of the land, including the improvements. He calls upon Handley to state whether he did not prove the value, including improvements, and what was the consideration given him. He alleges that the contract was made by Ewing in good faith, he claiming the title as locator, but had not been able to obtain it until the suit was commenced; and he requested verdict to be reduced to the proper standard. As to assets having come to his hands, he states that there are none that have come to his hands but what have been fully paid away; and that if the complainant will examine the records of the county court, he will find the estate indebted to him, and since that settlement no funds have come to his hands. He alleges that none of the slaves in contest ever came to his hands, and were in the possession of and claimed by others, and he did not consider it incumbent upon him to commence suits for them as administrator; that he had no vouchers or papers to show that they belonged to the estate, which would justify his bringing suits and incurring costs to establish at best a doubtful claim, and one in which he must, in all probability, be defeated. He likewise insists that Handley should be compelled to surrender the land before he obtained relief.

Handley answered the interrogatories placed in the answer of the defendants as a cross-bill by admitting that he paid for

the land purchased by him of Ewing, in property, at the early day of cash value; that he gave for it about one dollar or one dollar and fifty cents per acre, which he could not be certain; and admits he proved and recovered its value at the date of recovery, but without improvements, when the administrator appeared by counsel, and made full defense; and rests on the verdict and judgment as a bar to further inquiry on this subject. He insists that Ewing sold him land to which he had no title, and knew it at the time, and denies that there was any title in Ewing as locator, or in his relative, for whom they allege the land was located, or that Ewing ever had any writing or claim for it; and, of course, was guilty of a fraud which justly subjected his estate to the full value of the time of the assessment. He alleges that the heirs of that relative are known to the defendants in that court, and are their relations and residents of this country; and that the proceedings against them as unknown, are all a device to get at a pretended title, without permitting these relations to contest it. He avers that he is willing to take a good, indisputable title, and release his judgment, if it can be conveyed. He denies that he or his son is bound to pay rents, or account for profits, or to restore the land, except to the right owner; and that the heirs of Ewing have no right or title thereto.

After the coming in of the answer of Charles Wickliffe, or rather his amended answer, which disclosed the will of Martin Hardin, the maternal great-grandfather of the present heirs of Ewing, the said Handley amended his bill, and caught at another family of negroes, stating that some time after the death of Martin Hardin, Robert Wickliffe, his son-in-law, named in the will, also departed this life, childless, and also made his will, devising the said negroes bequeathed to his wife, Mary Wickliffe, in the same manner that they were directed to pass by the will of Martin Hardin, except one; and that as the said negroes, by the said latter will, were directed to go to the children of Charles and Lydia Wickliffe, in case the said Robert and Mary had no children, and as Mrs. Ewing, formerly Miss Wickliffe, the mother of the present heirs of Ewing, was living, and of the age of eight or ten years, and was one of the children of said Charles and Lydia, the interest in her on the failure of the issue of Robert and Mary Wickliffe, became vested, and not contingent, before her marriage with Ewing, and as he survived her, the said vested interest belonged to him, and was subject to his debts; and that Mary Wickliffe had afterwards

married, and lately, since the death of Charles Ewing, had departed this life, whereby her life-estate was terminated; and that about forty negroes were divided between the children of Charles and Lydia Wickliffe, and that the share of the heirs of Ewing in this division amounted to one thousand and sixty dollars, which, he alleges, is subject to Ewing's debts; and that the administrator would not, in the same collusive manner, recover and receive those slaves, and subject them to the debts of Ewing.

The heirs of Ewing again answered, admitting that they had, on the death of Mrs. Robinson, late Mary Wickliffe, received sundry negroes; but they allege that they received and claim them under the will of Robert Wickliffe, and contend they are not, and never were, subject to Ewing's debts. The court below, on a final hearing, decreed that the slaves which passed by the will of Martin Hardin to Robert and Mary Wickliffe, and which, on the death of both of them without issue, came to the heirs of Charles Ewing, and also negro Hannah and her nine children, which were in the possession of Ewing in his life-time, should be assets in the hands of the said Charles Ewing's administrator, subject to the payment of the common law judgment, which the bill was brought to enforce, and that the defendants should pay the costs. From this decree the defendants below have appealed and now assign various errors in the decree and proceedings of the court below.

The first of these which we shall notice is that which complains of error in the court below, in overruling the demurrer of the administrator of Charles Ewing to the bill of complainant. It has been contended that the bill shows no ground for an application to a court of equity, and that the remedy at law was so plain and easy that an execution on the judgment might have been issued at once. We are aware of no law which would permit an execution to be issued on this judgment of Handley, without first issuing a *scire facias*, suggesting that since the commencement of the suit at law, assets had come to the hands of the administrator; and if on the trial thereof, it should be judicially ascertained, by a judgment on default, or an issue found for the plaintiff, that such assets had since come to the hands of the administrator, judgment might be rendered that the plaintiff have execution of his original judgment. Such is the mode of effectuating all judgments rendered to be levied *de bonis quando acciderint*. If the suggestion, or rather allegations of the complainant below, be true in this instance, that he was

unable to prove the amount without a discovery, what benefit could he have derived from a *scire facias* at common law?

A bill of discovery of assets, in favor of a creditor, belongs to a class of bills not unusual, and, indeed, well known to a court of equity, and this bill is entitled to that rank. Besides, if an administrator will not take into his hands, or recover by legal process, goods and chattels which he might, what redress has a creditor holding a judgment *de bonis quando acciderint*, in a court of common law? He must, on the trial of the issue whether goods have or have not come into the hands of the defendant, show that he has received them, and it is not sufficient to show that the administrator could, if he would, have gotten them. An application to the chancellor, then may, in this case, be proper. It frequently may happen that the testator or intestate has incumbered his estate with some fraudulent conveyance, which may be valid against himself, and also against his personal representative, who claims under him, but yet be void as to creditors. Here the administrator could not recover; but ought the creditor to be compelled to stand by, equally silent, when the deed is void as to him, and not be allowed to resort to a court of equity? In this case the slave Hannah, and her offspring, might be liable for the debts of Ewing, although only loaned to him, and not regained for five years, by demand or due process of law, under the statute to prevent frauds and perjuries (1 Dig. L. K. 618), and yet his administrator might not be able to recover the slaves from Charles Wickliffe, upon the five years' possession of his intestate; because that possession was amicable and not adverse. Indeed, Charles Wickliffe might recover the slave from the administrator, if he held the possession, the statute of limitations notwithstanding, and yet the slave be subject to the debts of Ewing, because of the five years' possession, which gave him a delusive credit. Under such circumstances, a bill in chancery would lie, as the proper remedy to reach the fraud, and no proceedings at law against the administrator could reach the slaves. For these reasons we view this bill as making out good grounds for application to a court of equity, and conceive the demurrer of the administrator as he was a proper party to all such controversies, as properly overruled.

The next question we shall notice arises from the following circumstances: After the answer of Charles Wickliffe, and the amended bill of Handley, claiming to subject the slaves derived from Robert and Mary Wickliffe; and the answers thereto, the

complainant dismissed his bill as to the heirs of Charles Ewing. They afterwards presented their petition, alleging that their interest would be materially affected by the dismissal, and relying on the proofs in the cause, prayed the court by order or decree to direct the complainant again to make them defendants, or to consent to reinstate the cause as it stood before the dismissal by a day fixed by the order, or in case of failure, that the court should suspend the trial or dismiss the bill without prejudice. The counsel for the complainant agreed that they should be made parties, and that the cause should be heard upon the preparation as it stood, and upon this offer the court overruled the application, and the heirs of Ewing excepted.

According to the original shape of the cause, it may be doubted whether the heirs were properly made parties to the contest for subjecting their lands. If they held lands by descent, the bond in this case expressly bound them; and although the bond was dated before lands were subject to a sale by *fiery facias*, yet they could be subject to an *elegit*, and suit at law might have been brought against them on the bond, without joining the personal representatives. Hence, because the remedy at law was complete, the right to proceed against them in equity may be questionable, especially as the bill professes no ignorance of their title. But after the claim set up against them for the slaves derived from Robert Wickliffe, as they held possession of them, they were proper defendants, and ought to have been continued. But still we do not perceive any advantage that they could have had by the court making the order required, over the attitude in which they were placed by the consent of the opposite party. So far as they required Handley to surrender the land, their cross-bill was adequate for their redress, which according to the decision of this court in the case of *Wilson's Heirs v. Bodley*, 2 Litt. 55, was not dismissed without their election, on the dismissal of the original bill brought by their adversary. The consent, then, to make them parties, which they embraced, must be construed as giving them additional advantages, and to place them in such an attitude as to enable them to protect their interest in every respect. We, therefore, discover no error in refusing the order or decree required by their petition, after what was granted to them by consent.

The next error assigned contends that the court erred in not reducing this judgment to the purchase-money and interest given for the land sold, instead of its present amount. As to

the administrator, he has made out no sufficient grounds for such a reduction. He did not attend the trial at law, barely because it was inconvenient on account of the distance. He professes ignorance about the controversy; but this arose from his never having looked into the papers of the suit at law, to discover what was demanded. Of course the verdict as to him ought to be conclusive. We are unwilling to admit that this verdict and judgment are entitled to no weight against the heirs so far as they have interest in the slaves in contest. It is *not* necessary that we should now inquire into the precise weight which a verdict and judgment against administrators ought to have against heirs. They are certainly entitled to some, as to the personal estate, and that cannot be less than *prima facie*, and what is done in the suit against the administrator ought to be presumed to be rightly done; and as they have shown no fraud in obtaining the judgment, and no excuse for the default of the administrator, they ought not to be excused from its effects, at least on chattels and slaves.

The next question we shall notice is, the liability of the numerous slaves devised by the will of Martin Hardin, to Robert and Mary Wickliffe, during their lives, and then, on failure of issue, to the children of Charles and Lydia Wickliffe, of whom the wife of Ewing was one. It is well settled, as contended in the argument, that if any interest in a chattel vest in a female before or during coverture, although a particular estate may exist undetermined, so that no possession is acquired by the husband during the life of the wife, the right will belong to the husband in case he survives, and pass to his administrator; and it is said further, that he is entitled by a series of decisions, even to her contingencies, as much as to any other species of her property; and the right of administration follows the right of the estate, and ought, in case of the husband's death, after the wife, to be granted to the next of kin of the husband; and if administration is granted to a third person, he is a trustee to the representative of the husband: Jacob's Law Dict., tit. Baron and Feme; *Pinkard's Executor v. Smith*, Fall term, 1821; *Banks v. Marksberry*, present term. If, then, these negroes vested in the wife of Ewing on the death of Robert Wickliffe, or she comes within the description, as the bill seems to suppose, there could be no difficulty in this case. But this is not the fact. It was not to the child or children of Robert and Mary Wickliffe that these slaves were directed to pass by the will of Hardin, after their life estate was determined. If it

was, it might well be contended that the possibility of issue became extinct at his death. But it was to the child or children of Mary Wickliffe that the slaves were to pass; so that any child which she might have by any other husband would have been entitled. Of course, the death of Robert Wickliffe did not secure the children of Charles and Lydia, or procure the contingency by which the estate would vest in them, and the event was postponed until the death of Mary, which did not happen till after the death of both Ewing and his wife. The inquiry then is, was the legacy to the children of Charles and Lydia Wickliffe, which did not depend upon a condition, but on an event wholly uncertain, to wit, the existence of the offspring of Mary Wickliffe, of such character that it would pass to the next of kin to Mrs. Ewing? If it would, the representative of her surviving husband would take it; if it would not, then there is no pretext for subjecting it to the debts of Ewing. The solution of this question involves the further construction of the will of Martin Hardin.

The testator could not mean the children of Charles and Lydia Wickliffe, which would be alive at his death; for then the life estate of Robert and Mary Wickliffe might not be determined. He must have intended the children which should exist at the death of Mary Wickliffe, as the persons who should take. Had he spoken of the children which were alive at the making of the will, or those alive at his death, then Mrs. Ewing would have been identified as one which would take on the happening of the contingency, as if she had been named, and it might have been contended that on the happening of the contingency her representative would take. But as the intention was to designate the children living at the death of Mary Wickliffe, Mrs. Ewing did not live until that event, and therefore she is not described in the will, and the legacy to her was lapsed, or to speak with more propriety, went to such as did exist at the death of Mary, exclusively, and no representative which she might have could answer the description of children then living. It is, says Roper on Wills, p. 12, settled, that any person who can entitle himself under the description, at the time of distributing the fund, viz: as well those children living at the period of distribution, though not born until after the testator's decease as those born before and living at the happening of the event, will be permitted to take. It may be said that the children of Mrs. Ewing, alive at the death of Mary Wickliffe, could fill the description of children of Charles

and Lydia Wickliffe, although they were grandchildren, it is true grandchildren are frequently included within the term children; but this is where there are no children: Cunn. Law Dict. tit. Children. Besides, this would not help the complainant; for those grandchildren would take as legatees, and not as representatives of their mother, in which case the property could not be subjected to the debts of the father. There is, however, error in so much of the decree of the court below as subjects these slaves. We have not thought it proper to inquire into the tenure of these slaves under the will of Robert Wickliffe, by which both bill and answer allege they passed, because: 1. We do not perceive, under the proof, what power Robert Wickliffe had to devise these slaves, if he held them under the will of Hardin; 2. It is alleged that the will of Robert Wickliffe made the same disposition as that of Hardin, and therefore can have no effect; and, lastly, this will is not filed in the cause, and we do not think it proper to disturb the possession of an estate by following the terms of an instrument which we have not before us.

Having disposed of the slaves which came through Robert and Mary Wickliffe, we pass on to the family of Hannah, the child of Frank or Fanny. Here it has been strenuously urged that, as by the will of Martin Hardin, this slave, mother of all the rest, was devised to Charles and Lydia Wickliffe for life, with power of disposing of her to their children when they pleased, and that as the power never was exercised during the life of Mrs. Ewing, and that the evidence shows that the slave was lent and not given, therefore, she and her family could not be subject to Ewing's debts. We do not deem it necessary to scan the evidence very minutely to determine whether this slave, Hannah, was given or lent. There is testimony conducing to prove both sides of this question. A letter written by Ewing, in 1791, to Charles Wickliffe, acknowledges it to be a loan only, and the rest of the testimony on that side arises from the declarations of Charles and Lydia Wickliffe, and of Ewing and wife. Waiving the doubt whether any of this testimony is competent, we shall consider it as a loan only, and see whether the effects of it will not be the same in this case as a gift. For if she remained with Charles Ewing five years "without demand made and pursued by due process of law," then, according to the letter of the act to prevent frauds and perjuries, she and her family are subject to Ewing's debts. We do not attach any importance to the inquiry whether the power given by the will of Martin Hardin, of disposing to their children, was or

was not exercised in due form, by Charles and Lydia Wickliffe, during the life of Mrs. Ewing, and that for the following reasons: The same will which gave them a life estate, also gave them a right or power to grant to their children; consequently they had the power of lending to them, and if they did so, and the possession under that loan continued undisturbed for five years, the slaves, under the direction of the act, would become subject to the debts of Ewing. Besides, we are inclined to believe that the slave Frank, the mother of Hannah, and Hannah herself, were not subject to the bequest of the will of Martin Hardin, although such bequest is made. For it is proved that on the marriage of Charles and Lydia Wickliffe, in 1767 (thirteen years before the death of Martin Hardin), Frank was put into their possession, and remained there undisturbed until this time; and Charles Wickliffe, in his original answer, treats these slaves as held in his own right, and the point that they were affected by the will of Hardin, is an after thought, which came out in the amended answer, as a position supposed to be more favorable to his title as opposed to the creditors of Ewing. Of course the question of a loan for five years, without writing recorded as the act directs, is the remaining inquiry. Because the possession of a slave so long gave to the holder a delusive credit, the statute intended to avert the evil. The proof is clear that the general possession of the slave, Hannah, as well as her children, as they came into existence, was with Charles Ewing, from the first of the year 1787 until about 1806 or 1807, or, at all events, until after the death of Mrs. Ewing in 1804. And the proof is equally clear that they were by many, perhaps a majority of those who knew them, supposed to be the property of Ewing, until after Mrs. Ewing's death. This establishes conclusively the existence of the very evil which the act intended to remedy, and casts upon the opposite side the necessity of proving clearly that the possession and ownership were regained once within each five years, to ward off the effect of the statute. On this point, the proof is not so clear of difficulty. It is shown clearly that in 1791, about four years after Ewing first got the possession of Hannah, an execution issued against the estate of Ewing, who was then absent from the country, and to avoid its effects upon Hannah, she was taken home to the house of Charles Wickliffe, and others sent at different times in her place, but in about the course of one year afterwards, when Ewing had returned and settled the debt, Hannah was restored to him. There is also proof that on one

other occasion, one of the children of Hannah was taken from the possession of a person to whom Ewing had loaned the use of the child when small. There is likewise proof that Hannah was seen afterwards at the house of Charles Wickliffe, but whether in such a manner as to give to Charles Wickliffe the exclusive possession and ownership, or only on those occasions of casual intercourse and visit which must result from the relation existing between the two families, is not shown. To relieve the slaves from the effect of the statute, Hannah and her family ought to have been removed in such an open and public manner as could leave no doubt in whom the possession existed. We, therefore, conceive that Hannah and her family are liable to the debt of Handley, and that the court below did not err in so deciding this controversy.

Several objections and criticisms have been made to the decree, even admitting these slaves are liable, some of which are just. That court has barely decreed that they shall be assets in the hands of the administrator, without placing them in his hands; when it is doubtful whether he could recover them, for, as before suggested, a creditor might subject them to his demand, when the administrator could not recover them. Here was no decree which could be enforced against the slaves. The party holding the judgment, held it in the same situation in which it was, and if *scire facias* should issue thereon, suggesting assets, it is very doubtful whether the administrator could or could not yet plead the want of assets at law. The decree ought, therefore, to have subjected Hannah and her children at once to sale, in satisfaction of the judgment at law, in the hands of the executors of Charles Wickliffe, as they, on his death, pending this suit, have become parties; and if their names or number are uncertain, an account ought to be taken to remove this uncertainty, and the executors be decreed to surrender them, to be sold under the decretal orders of the court, or enough of them to discharge the debt and all costs. We would further suggest that the administrator of Ewing has neither admitted nor denied whether he has received personal assets since the judgment, but refers to his accounts settled with the county court. The account directed, therefore, to embrace this matter, and ascertain what has come to his hands, if anything, that it may be appropriated first in satisfaction of the judgment.

One or two more questions made and debated in argument, deserve our consideration. Pending this suit, in 1814, Handley entered into an article of agreement with Jeroboam Beauchamp,

in which he assigned and transferred to Beauchamp the judgment which he had on Ewing's administrator, now in contest; and in consideration thereof, Beauchamp agreed that he would make to Handley, within a reasonable time, a good, clear and indefeasible title to the same two hundred and fifty acres described in Ewing's bond. But if Beauchamp should be unable ultimately to convey the land, then he was to pay Handley whatever sum or sums of money he, Beauchamp, might obtain by said judgment against Ewing's estate by this suit in chancery, or by setting off the judgment against any demands the estate might have against Beauchamp. Beauchamp had, before this suit was tried, succeeded in getting off upwards of three hundred dollars against a claim which the estate of Ewing held against him. After the date of this contract, Handley died, pending this suit, and it was revived before trial, in the names of his two executors. After this suit was argued and before the court for advisement, the administrator and heirs of Ewing filed their petition, praying the court to set aside the order of hearing and dismiss the suit, alleging that one of the executors of Handley had transferred and assigned to them the whole judgment against the estate of their intestate, and also the benefit of the contract with Jeroboam Beauchamp, and they exhibited a written transfer to that effect. To oppose this, Beauchamp exhibited his petition alleging that he had been at considerable costs and expense in pursuing this suit, which was now conducted for his benefit, and also in endeavoring to obtain the legal title for Handley to the said two hundred and fifty acres of land, which he yet had the prospect of obtaining; and also alleging that one of Handley's executors had disagreed to the transfer, and showed the writing of that executor, requiring the suit to go on for Beauchamp's benefit, and declaring that he never did agree to the transfer made by his co-executor.

The court below refused to dismiss the suit, and went on to render a decree. It is now contended that one executor had a right to transfer the demand, and, therefore, the court ought to have dismissed the suit; that as Beauchamp had not yet got the title to convey to Handley's representatives, by his own showing, the money belonged to the estate of Handley, and therefore one of the executors had a right to transfer it. It is true, that one executor, where there are more than one, has ample powers by law to transfer the goods of his testator, or release a debt; but it does not thence follow that either one or both executors could make such transfer in this instance, or

that the suit ought to have been dismissed on the prayer of the defendants below, if they had. The contract with Beauchamp is a covenant for land, or money, in the alternative. Whether his executors have a right to transfer it or not, depends, according to the decision of this court, in the case of *Hatcher v. Gallo-way*, 2 Bibb, 180, on the question, whether that part which stipulates land was broken by Beauchamp in the life-time of Handley, which does not appear. But if it was, Handley may have done acts to waive the breach, and the whole right of recovery thereon is to be ascertained by the trial of a proper issue, at law or in equity, as in other contracts. If the court below had decided that the reasonable time given to Beauchamp had elapsed, and, of course, that Beauchamp was barely to collect the money, and hand it over to Handley's executors, it would have been forestalling the rights of the parties by motion, or at least by petition, and in a summary way concluding matters which ought to be settled on proper pleadings, made up in the usual course. It would have been deciding at once, without trial, that Beauchamp had forfeited his contract, or that his contract was vitious, and he had no right to the money. The court, therefore, did right in overruling this application, leaving rights of the parties not prejudiced, to be asserted in the usual way.

Finally, the question presents itself, whether the court ought to have given the heirs of Ewing any relief on their cross-bill, or whether, as both they and the administrator insisted upon Handley being compelled to restore possession before he received satisfaction of his judgment, their prayer ought to have been granted. In cases of rescission of contract, the parties ought to be placed in *statu quo*, as nearly as can conveniently be done. Here is not a rescission asked from the decree of the chancellor; but there has been a performance on the part of Handley, and a recovery at law for a breach. In such cases, generally, on a recovery, there ought to be a restoration of the thing sold, subject to the lien of the purchaser for his purchase-money. But as it does not appear that Ewing had any title to the thing he sold, ought this case to form an exception? It is not true that Ewing in this case performed nothing. Handley evidently took possession under him, and Ewing had stipulated to keep him there, and he has not been disturbed. Possession of land may itself become a title, and often cannot be divested; and although it is denominated the least estate, it is one of great importance, and, of course, ought to be restored. Such

has been the requisition of this court in the case of *Lyon v. Humble*, 3 Marsh. 468, in which case the vendor had no title of record. It is true, that, as Handley took possession under Ewing, he might be subjected to an eviction in an action at law, as was decided by this court in the case of *Connelly's Heirs v. Chiles*, 2 Marsh. 242; but still, although the heirs of Ewing may have remedy at law, it does not follow that they cannot insist upon the same matter in equity, especially as the chancellor is asked for relief by the other side, and can finish the whole matter. Alexander Handley has the possession. He is made a party by one of the amended answers, and relief prayed against him as to the possession. Besides, he is one of the executors of his father, and has become a party by a bill of revivor; he is, therefore, properly before the court, and we conceive it reasonable that he ought to be compelled to restore the possession, on the payment of the purchase-money. But before this is done, an account ought to be taken of improvements and rents and profits. Improvements, lasting and valuable, made before the judgment at law, ought to be assessed at their present value, as they may be deteriorated by use and lapse of time; rents ought to be calculated on the land as it was when sold, and not including rents on the labor and ameliorations of Handley, and also all waste committed during occupancy, and the balance decreed to the party in whose favor it may fall; and a decree ought to be rendered that Handley restore the possession, subject to his lien for the purchase-money, or any balance of improvements which may be in his favor; and on the amount of the judgment at law, costs and improvements being paid, the court may, by decretal order, restore the possession to Ewing's heirs.

The decree must, therefore, be reversed, with costs, and the cause be remanded that a decree may be there entered in conformity with this opinion.

Upon a rehearing, granted on the petition of Charles A. Wickliffe, this opinion was affirmed.

RECOVERY OF ASSETS FRAUDULENTLY TRANSFERRED.—It seems now to be settled that as the administrator or executor represents the creditors of the estate as well as the intestate or testator, it is not only his right but his duty to collect all the assets applicable to the payment of the debts, including those which have been fraudulently transferred by the intestate or testator, in his life-time, and that his powers are as ample in this respect as those of the defrauded creditors: *Williams on Executors*, 1679, note x; *Welsh v. Welsh*, 105 Mass. 229; *Martin v. Root*, 17 Id. 222; *Gibens v. Peeler*, 5 Pick. 154; *McKnight v. Morgan*, 2 Barb. 171; *Morris v. Morris*, 5 Mich. 171; *Jud-*

son v. Connolly, 4 La. An. 169; *Brown v. Finley*, 18 Mo. 375; *Holland v. Craft*, 20 Pick. 321; *Choss v. Redding*, 13 Gray, 418; *Tenney v. Poor*, 14 Id. 500; *McLane v. Johnson*, 43 Vt. 48; *Boulough v. Boulough*, 68 Pa. St. 495; *Cross v. Brown*, 51 N. H. 486. And if the personal representative neglects to recover property so fraudulently transferred, it has been held that he is personally liable to the creditors: *Douney v. Smith*, 4 Tex. 411; *Lee v. Chase*, 58 Me. 436; *Cross v. Brown*, 51 N. H. 488. And it has been held that he is bound to include in his inventory property thus fraudulently transferred: *Williams on Executors*, 1679, note *z*, citing *Minor v. Mead*, 3 Conn. 289; *Anderson v. Pucker*, 7 Pick. 250; *Booth v. Patrick*, 8 Conn. 106; *Andrus v. Doolittle*, 11 Id. 283; *Bourne v. Stevenson*, 58 Me. 504. But otherwise if the personal representative has no knowledge of the fraudulent transfer: *Booth v. Patrick*, 8 Conn. 106; see *Potter v. Titcomb*, 10 Me. 53; *Cringan v. Nicholson*, 1 Hon. & M. 428. But it has been held where an intestate purchased and paid for land, and, in fraud of creditors, procured the title to be vested in his infant son, that one holding in the double character of administrator and creditor could not maintain a bill to bring the land into administration for the payment of debts, the title of the son being perfect as against the intestate and his representatives; and that, although there was a trust in favor of creditors, it could only be reached by a bill filed by a creditor specially framed to enforce the trust: *Blake v. Blake*, 53 Miss. 182. And it is held in the same state that an administrator cannot maintain a bill to set aside a fraudulent conveyance made by his intestate, for the reason that the statute makes such conveyances good against the grantors and their heirs and administrators: *Partee v. Mathews*, 53 Miss. 140.

RELEASE BY ONE EXECUTOR.—"Co-executors, however numerous, are regarded in law as an individual person, and by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all; for they have all a joint and entire authority over the whole property. Hence a release of a debt by one of several executors is valid, and shall bind the rest." *Williams on Executors*, 946; and see the following authorities cited in the author's notes, and also in those of Mr. Perkins, to this passage: *Touchst.* 484; 3 Bac. Ab. 30; tit. *Executors* C. 1 and D. 1; *Went. Off. Ex.* 206, 213, 14 ed.; *Ex parte Rigby*, 19 Ves. 462; *Lank v. Kinder*, 4 Harr. (Del.) 457; *Jackson v. Shaffer*, 11 Johns. 513; *Kerr v. Waters*, 19 Ga. 136; *Wheeler v. Wheeler*, 9 Cow. 34; *Edmonds v. Crenshaw*, 14 Pet. 166; *Stewart v. Conner*, 9 Ala. 803; *Owen v. Owen*, 1 Atk. 495; *People v. Keyser*, 28 N. Y. 226; 1 Roll. Ab. 924; *Executors*, O; *Com. Dig. Adm. B. 12*; *Poff v. Kinney*, 1 Bradf. Surr. 1; *Wilkinson v. Wootten*, 23 Ga. 568; *Gilman v. Healy*, 55 Me. 120; *Shaw v. Berry*, 35 Id. 279; *Bodley v. McKinney*, 9 S. & M. (Miss.) 339; *Gage v. Johnson*, 1 McCord, 492; *Bryan v. Thompson*, 7 J. J. Marsh. 587; *Shreve v. Joyce*, 36 N. J. L. (7 Vr.) 48; *Bogert v. Hertell*, 4 Hill. 492; 9 Paige, 52; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Jackson v. Robinson*, 4 Wend. 436; *Murray v. Blatchford*, 1 Id. 583; *Douglas v. Satterlee*, 11 Johns. 16; *Hall v. Carter*, 8 Ga. 388; *Chew's estate*, 2 Para. Sel. Cas. 153; *Wood v. Brown*, 34 N. Y. 337; *Dyer*, 23 b in *marg.*; *Jacomb v. Hardwood*, 2 Ves. Sen. 267; *Devling v. Little*, 26 Pa. St. 502; *Hoke v. Fleming*, 10 Ired. 26; *Weir v. Mosher*, 19 Wis. 311; *Son v. Miner*, 37 Barb. 466; *Smith v. Whiting*, 9 Mass. 334; *George v. Baker*, 3 Allen, 326; *Herbert v. Pigott*, 1 Cr. & M. 384; 4 Tyrhw. 285; See, also, *Herald v. Harper*, 8 Blackf. 170; *Dean v. Duffield*, 8 Tex. 235; *Beattie v. Abercrombie*, 18 Ala. 9; *Rick v. Gilson*, 1 Pa. St. 58. But one of several executors acting alone cannot bind the estate by making or indorsing notes, even though in renewal of notes of the testator: *Bailey v. Spafford*, 21 N. Y. Sup. Ct. 86.

MAY v. FRAZEE.

[4 LITTELL, 391.]

EXECUTION OF POWER BY ATTORNEY.—A naked power cannot be delegated, but where a devise is to executors in trust to sell and convey, it seems that they may act by attorney.

DEVISE IN TRUST TO WIFE.—A husband cannot sell lands devised to his wife in trust so as to vest the legal title in her.

FACTS STATED IN A PRIVATE STATUTE are strong evidence against those who procured its passage.

APPEAL from the circuit court. The opinion states the case.

Hardin, Bibb, Sharp and Huston, for May.

Haggin and Crittenden, for Frazee.

By Court, **MILLS, J.** John Tabb was possessed of two Virginia land-office treasury warrants amounting to the quantity of forty-two thousand five hundred and thirty-two acres, which were entered in his name in five separate entries on the twenty-fourth of December, 1782, and were afterwards granted, by patents from the commonwealth of Virginia, jointly to said John Tabb and John May, except one which was granted to Tabb alone; so that each became vested with one undivided half of the legal estate. On the fifteenth of August, 1785, before the emanation of the patents, John May made out a statement of them, with other warrants, showing the interest therein of Tabb and the other owners, in the following words: "John Tabb, two warrants, No. 9,793 and 9,794, the said Tabb's proportion being three sixth parts; the said William Kennedy and William May, one sixth part each; the remaining sixth part is the said John and George May's joint property. All expenses to be paid by said Tabb."

He added to the close of this list a declaration that the foregoing was a statement of the locations made in partnership between the before-mentioned parties, and thereto signed his name as the agent of all the persons concerned. On the same day, William May indorsed on the back of this statement that it was correct, and transferred his interest therein to Matthew Walton, who was to stand in his place; and John May, by another indorsement, agreed to convey to Walton the interest of the said William May. Walton, on the tenth day of September, 1795, made an indorsement on the same paper, assigning the same interest to Lewis Craig. On the twenty-seventh of March, 1795, George May, by a proper writing, sold and assigned all his

interest in said lands to Philemon Thomas. On the fifth day of June, 1787, John May and William Kennedy made an exchange of part of the interest in two of the tracts; John May gave part of the entry of eighteen thousand acres, now the subject of this controversy, and Kennedy gave up therefor part of his interest in another entry of four thousand five hundred and thirty-two acres (all in the name of Tabb), and entered into writings as follows: "Whereas William Kennedy and John May are interested in several tracts of land, surveyed in the name of John Tabb, lying on the Ohio, below the mouth of Big Bone creek, being part of a location for about four thousand five hundred acres, and also in another survey of eighteen thousand acres, made in the said Tabb's name, near the Ohio, on the waters of Lee's creek. It is therefore agreed upon that the said Kennedy shall give up to the said May, all his interest in the land lying on the Ohio, below the Big Bone creek. In consideration whereof the said May agrees to give up to the said Kennedy out of the aforesaid survey of eighteen thousand acres, six acres for every five that the said May shall obtain in right of the said Kennedy, out of the first-mentioned lands; which lands so to be given the said Kennedy, by the said May, shall be equal in value to the generality of the said May's share of the said eighteen thousand acres."

On the sixth day of September, 1792, said Kennedy sold to said Lewis Craig all his interest in the said eighteen-thousand-acre tract, including not only his original proportion of one sixth, but also the additional share which he was to have therein by virtue of the aforesaid exchange with John May; and writings were executed accordingly. This additional quantity gotten by the exchange with John May, when calculated at the rate of six acres for each five of Kennedy's interest in the Big Bone entry, amounted to three hundred and forty acres. On the twenty-eighth of March, 1794, Philemon Thomas obtained from John Tabb, a conveyance in fee of all his interest in the said tracts of land patented to May and Tabb, in which purchase Craig was, to some extent, a partner, but his name is not known in the conveyance, nor is it material in this controversy to what extent. According to the foregoing transfers, Craig and Thomas seem to have been entitled to most of the whole eighteen-thousand-acres, to wit, one half from John Tabb, one sixth from William May, through Matthew Walton, one half sixth from George May, one sixth from William Kennedy, and eight hundred and forty acres of the remaining half sixth of John May;

so that the interest still remaining in John May appears to be only six hundred and sixty acres, supposing the tract to be divided by equal quantities. John May was killed by the Indians in 1790, and his will, which will hereafter be more particularly noticed, was afterwards recorded in Chesterfield county, Virginia, where he resided, but none of the executors named in the will qualified as such, or took upon them the execution of the will, until the year 1797, in the month of July, when his widow, who had previously married Thomas Lewis, qualified as executrix.

On the twenty-eighth of June, 1792, the legislature of this state, on the petition and at the instance of said Philemon Thomas and Lewis Craig, passed an act of assembly to the following effect: "Whereas, John Tabb and John May were seised and possessed of the legal title in and to forty thousand five hundred and sixty-seven acres of land, and the said John Tabb to twelve hundred and seventy-nine acres, situate in the counties of Mason, Bourbon, and Woodford, by virtue of entries made with the surveyor of Fayette, in the name of said Tabb, bearing date the twenty-fourth day of December, in the year of our Lord 1782; and, whereas, by various agreements and assignments, the equitable right to said lands, amounting in the whole to forty-one thousand eight hundred and forty-six acres, has become vested in John May, Lewis Craig, and Philemon Thomas, in the following proportions, that is to say, to the said John May ten thousand four hundred and sixty-one and a half acres; and to the said Lewis Craig and Philemon Thomas the residue, which is thirty-one thousand three hundred and eighty-four acres; and whereas the said John May hath departed this life, leaving a last will and testament, duly executed, proved, and recorded in the county court of Chesterfield, by which he directed that the executors therein named should take all necessary steps to complete all his land claims, and the said executors having neglected or refused to take upon themselves the execution of the said will, the right of the said John May, in and to the above-mentioned proportion of the said land had descended to Mary May and John May, his only children and heirs at law, who, being infants under the age of twenty-one years, cannot enter into an agreement with the said Lewis Craig and Philemon Thomas, concerning a division of the said land, agreeably to their respective interests therein; and, whereas, the said Lewis Craig and Philemon Thomas, being desirous of settling their proportion of the said land, have

petitioned the general assembly that an act may pass directing the manner in which such a division shall be made of said land.

"Be it enacted by the general assembly, that Alexander D. Orr, Arthur Fox, and Miles W. Conway, gentlemen, or any two of them, may lay off and divide the said lands between the heirs of the said John May and the said Lewis Craig and Philemon Thomas, according to their several interests in the same, as above stated, agreeably to quantity and quality; and that after having so laid off the same, they shall return a fair plat of the said division to the county court of Mason, there to be recorded; which division, so made and recorded, shall be effectual to pass to the said Mary May and John May, and to the said Lewis Craig and Philemon Thomas, the legal title in and to the part so allotted to them respectively, in as full and ample a manner as if the time had been made by order of a court of chancery: Provided, that the said John May and Mary May, may at any time within two years after they may respectively attain the age of twenty-one years, file a petition in the county court of Mason, stating any objections they may have to the said division of the said land, whereupon the said court shall inquire into the merits of said division; and if it shall be found to have been made in conformity to the directions of this act they shall confirm the same; but if it shall appear to them to have been made contrary thereto, they shall set aside the same, and make such order therein as shall be agreeable to justice and equity: Provided, also; that nothing in this act contained shall be construed to extend to affect the right, title or claim in and to the said lands, or any part thereof, of any person whatever, except the said Mary May and John May, and of the said Lewis Craig and Philemon Thomas."

On the twenty-sixth of September, 1794, a division of the said eighteen-thousand-acre tract, and no other, was returned to the Mason county court, and there recorded, signed by two of the said commissioners named in said act, the third having acted as surveyor in the execution of the survey, but from some unknown cause did not join in the report. In this division the commissioners first platted out some prior interfering claims, and did not include them in the calculation as land belonging to the parties, and divided the residue, assigning to John May's heirs, as their proportion, three thousand five hundred acres; that is three thousand in one body, and five hundred acres in another, and left ten acres around a lick, then supposed to be valuable, undivided. The quantity of three thousand acres so assigned to May's heirs is now the subject of controversy.

After Mrs. Lewis, the executrix, had obtained letters testamentary in Virginia, she and then her husband, Thomas Lewis, on the twenty-seventh of May, 1798, executed a letter of attorney to Richard Stevens, William Vawter and John Lewis, of Kentucky, authorizing them fully to do all things necessary to be done under the will of the said John May in Kentucky, either jointly or severally, "except the executing of titles to lands," which should be done by the whole of them, or the said Stevens; excepting also, "if it should be thought expedient to relinquish any lands," it was to be done as in the case of the execution of titles. The same letter of attorney recited that Thomas Lewis had a letter of attorney from Joseph Jones, to do certain acts for Joseph Jones, touching lands in this country; and this letter of attorney transferred to Vawter and Stevens all the powers so delegated to Lewis himself, and authorized them to execute them for Lewis alone. This letter of attorney from Lewis and wife was acknowledged on the day of its date, before two justices of the peace of Chesterfield county, Virginia, whose offices were certified by the clerk of the county, under the seal of the court, and within three months was produced to the clerk of this court, and recorded by him. On the twenty-ninth of January, 1803, Vawter sold to Lewis Craig all the land assigned by said commissioners under the act of assembly to John May's heirs, and executed a conveyance to Craig therefor, in the name of Thomas Lewis alone, and not expressing his executorial character. It purports to convey that part of John Tabb's eighteen-thousand-acre tract on Lee's creek, which had been "allotted by Miles W. Conway and Alexander D. Orr, in pursuance to an act of the general assembly, to John May, George May, William May and William Kennedy, and agreeably to the several assignments and contracts to and with said Craig." It also professed to include the interferences with the prior claims, which the commissioners had platted out in said division, and purports to convey about eight thousand acres thereof. The deed is signed "Thomas Lewis, by William Vawter, his attorney in fact," and has no allusion to the title or powers of Lewis under the will of John May, except that in the latter clause is a warranty "against the claim or claims of all those claiming through, by or under the title of the said Thomas Lewis, as executor of the estate of John May, deceased."

John L. May and Daniel Eppes and wife, the only children of John May, deceased, brought an action of ejectment against

the tenants residing on the three thousand acres assigned in a body to the heirs of John May, and recovered a judgment at law. To injoin this judgment, Lewis Craig, Philemon Thomas, and the several tenants, joined in this bill, setting up the foregoing facts and transfers, admitting that the legal title did not pass to Craig under the deed by Vawter as agent, because it was informally and mistakenly written in the name of Lewis, when it ought to have been in the name of Lewis and wife, as executor and executrix of May, which they say arose from the want of sufficient skill in the parties, and insisting that it was in substance a purchase from the executors, and so intended, and that it ought to be enforced as such, as Vawter had a power to sell, although Stevens was bound to join in the making of titles, that Craig had sold to the tenants who claimed under him; and if said contract with Vawter could not be enforced, that still, as the interest of all the partners was vested in said Craig and Thomas, by the aforesaid assignment, except about six hundred and sixty acres, left in John May, that a new division ought to be decreed, leaving to the lessors of the plaintiff at law only that quantity, instead of the quantity claimed.

The answer denies knowledge of the different sales and assignments of the different parties set up in the bill; relies on the act of assembly, and division under it, as fixing their interest; denies any knowledge of the purchase of Craig from Vawter, and insists that the letter of attorney authorized no such sale; that the consideration given to Vawter had never come to them, and had failed, and that there was no principle of equity on which said transactions between Craig and Vawter could be enforced against them. The circuit court decided that the sale of Vawter to Craig passed no equity that could be enforced against the heirs of J. May, and that, of course, Craig, or those claiming under him, had no title to their interest, and then proceeded, disregarding the act of assembly, to settle the interest of Craig and Thomas, by virtue of their several purchases anterior to the purchase of Craig from Vawter, and fixed the interest of J. May's heirs to one twelfth of the whole, and directed that it should be laid off to them out of the unimproved land, if practicable, somewhere in the whole tract; and that to obtain this, all the tenants on the whole eighteen thousand acres, who had purchased under Thomas and Craig, should be made parties. The complainants below forthwith amended their bill for this purpose; but afterwards that amendment was

withdrawn by consent, and each party appealed from the interlocutory decree.

The first question of importance presented by the appeal of the complainants below is the validity, in a court of equity, of the contract made between Craig and Vawter, for the interest of the heirs of John May. After the most mature deliberation on this point, we think, with the circuit court, that this contract ought not to be specifically enforced against the heirs of John May, and that for the following reasons: The consideration given by Craig was as follows: he executed his notes for five hundred pounds, payable to Thomas Lewis, as the executor of John May. Most of this sum was paid to Vawter, in discharge of these notes. Lewis, as executor, refused to receive these notes, and disavowed the act of Vawter in selling, and no part thereof ever went to the benefit of John May's estate. Another part of the consideration was, John May had given bond to Matthew Patton, binding himself that his interest when the bond was to be performed, in the eighteen-thousand-acre tract, should be at least three thousand acres, and that he would convey to Patton one thousand acres, choice of said three thousand acres. This bond was set up against the estate of J. May, in this country; and Craig conveyed two tracts of land to the heirs or representatives of Patton, in discharge of this bond, which they agreed to accept in satisfaction thereof, it being believed by Vawter, as he deposes, that J. May did not possess sufficient interest in the eighteen thousand acres to discharge the bond to Patton. In these conveyances to the heirs of Patton, Vawter joined with Craig as surety for the title. The bond of Patton was assigned to Vawter individually. Vawter deposes that he held the bond for the benefit of the estate of John May, intending that it should be extinguished. But on Lewis, the executor, in right of his wife, disavowing the sale, Vawter assigned this bond to Robert Johnson, who commenced some legal proceedings thereon against the heirs of May, and the controversy was referred, by order of the court, on consent of the parties, to referees, who awarded damages against the heirs of J. May, for a breach thereof, for which judgment was rendered, which they have satisfied, or are bound to satisfy. It is evident, then, that if this contract of Vawter was enforced in favor of Craig, it would be attended with peculiar hardship on the heirs of John May; for they have not received one cent of the consideration, nor has it inured to the benefit of their ancestor's estate; and besides, they are bound

to discharge a claim by the act of Vawter, which was to have been discharged by his sale of their land to Craig. And it is a rule in equity, that equity will not enforce a contract specifically, which by subsequent events will impose great loss on the defendant, but will leave the party to his remedy at law.

To this, however, it is answered, and that plausibly, that Vawter was the agent of the estate and not of Craig; and that if Vawter misapplied the consideration of the purchase, it was not the business of Craig but of the executors who, or their agent, are responsible. To this, however, we reply that, admitting, for the sake of argument, without giving any positive opinion thereon, that Craig was not bound to see to the appropriation of the property paid by him, it is certain that Patton's bond could have been discharged out of the eighteen thousand-acre tract. The commissioners had, long before, under an act of assembly, procured on the joint petition of Craig and Thomas, when they themselves had the fixing of May's interest, laid off three thousand five hundred acres to May's estate. These facts are certainly known to Craig and perhaps to Vawter. If they were known to the former alone, he did not represent the true state of the case to either Vawter or Patton, which he ought to have done, so that the bond might have been discharged by the land it called for, instead of other lands from Craig, in order that he might obtain the whole eighteen thousand acres. If these facts were known to both Vawter and Craig, it makes Craig's case no better, for it is improper for them to combine to purchase up the land, with other lands, under a pretext that it could not be discharged with the lands it claimed on its face, contrary to the truth of the fact. Another circumstance conduces to show unfairness. The deed from Vawter to Craig purports to convey the land laid off by the commissioners "to John May, George May, William May and William Kennedy," when there was no such land laid off, nor had the commissioners any power to lay off any such lands to George or William May or William Kennedy; but only for the heirs of John May and Thomas and Craig. Now this statement must have been procured by Craig, who knew better, to the deception of Vawter; or both, knowing otherwise, so stated it to blind the executors and heirs. Add to this that Vawter deposes that Craig knew the extent of his power of attorney, and that he was not authorized to convey, and was possessed of every circumstance relative to the defects thereof, and took the conveyance at a risk. These circumstances preclude Craig from standing in the atti-

tude of innocence and ignorance, and make him, measurably, *particeps criminis* in the mal-appropriation of the money, or at least to show that he entered into a contract, defective and not advantageous to the heirs, with his eyes open, and not containing on its face the truth of the case. They are circumstances which render his case unfavorable; and if they are so for him, they must be equally so for the other complainants in the bill, as they have not shown how they hold under him, whether as innocent purchasers, or as tenants, or that they have any length of time in their favor.

Other objections lie against enforcing this contract. It has been decided by this court, in the case of *May's Heirs v. Slaughter*, 3 Marsh. 504, that Mrs. Lewis took the legal estate under the will, when she administered, and that previous thereto the heirs held it subject to the contingency of her administration. It has been contended in argument that she only had a power to sell, and that such power could not be delegated to an attorney, according to the maxim, *delegatus non potest delegare*. This, as a general principle, is admitted, and well established in *Berger v. Duff*, 4 Johns. Ch. 368, and authorities there cited. Here, however, the will of John May devised as follows: "I give and bequeath my land to my executors, hereinafter named, and to the survivors or survivor of such of them as may act and their heirs for the purpose of selling as much thereof as will pay all my debts of every kind." He also proceeds to give ample powers, not only to sell and convey, but to adjust and compromise and convey, in discharge of some specific legacies, and then directs the residue of his estate to go to his widow and the two defendants in the court below who were his children, in equal proportions. These provisions of the will give more than a power, and vest an interest on the legal estate, so that the objection that a power cannot be delegated to an agent, does not apply. Still, however, an objection equally formidable remains. The title went to Mrs. Lewis on her administration, and although she might not be able to execute the trust and part with the estate without her husband joining in the act, as he was to be responsible for mal-administration; yet we conceive that he could not sell and convey without she was joined in the deed. It is true a husband, who is executor in right of his wife, may sell the chattels of the estate which pass by delivery, and release debts, without the consent of his wife, but it is not so clear that he could sell real estate under a bare power given in a will. But without expressing any opinion on

this point, we have no hesitation in saying that he could not sell the lands, the title of which was in her.

In this case, the title was vested in trust for particular purposes; but we are aware of no rule of law which would make it an exception to the general rule, that the husband cannot sell and pass the lands of the wife, unless she is joined. In this case she had signed and sealed the power to Vawter as well as her husband; but we are aware of no law in existence, at the date of this power, which enabled a *feme-covert* to sell and convey lands by letter of attorney, even if the estate was her own, and not held in trust; and we see no reason why this case of a trust should be an exception, unless there was a collateral power. It results then that the letter of attorney conferred no power on the agents to sell lands without her, and that she is, of course, no party to this contract between Vawter and Craig, and as she is not, Craig could not acquire either a legal or an equitable estate. And this will be the result, even if it be admitted that Vawter executed the power inartificially, by mistaking the proper mode of which there is no proof. And indeed this is a circumstance which rather casts a shade of suspicion on the transaction. It is somewhat probable that the title was so executed designedly, and that both entered into it for the purpose of giving Craig the semblance of a legal title, to enable him to have the color of right to convey to the purchasers from him, who were pressing him for conveyances.

As then the contract between Craig and Vawter cannot be enforced specifically, the parties go back to their original interest which they held before that sale took place; and the inquiry remains what that interest is which then belonged to the representatives of John May? Was it the fraction of a twelfth, as seems to appear from the writings produced by the complainants below, or is it the fourth, as fixed by the act of assembly? This question must turn upon the weight which this act of assembly is to have in the cause, coupled with other circumstances; for it is clear that by the writings held by Craig and Thomas, the interest of the representatives of May is far less than the statute assigns them. We need not here inquire into and determine whether the division directed by this act was such a power as could be exercised directly by the legislature, and whether it vested the legal estate in the parties, according to its directions. If it was the act of the legislature of a country which could exercise all powers, legislative, judicial and executive, there could be no doubt that such an act

might conclude the rights of the parties; but in this country, where the powers of government are divided, and confided by the constitution, each to a separate body of magistracy, and none of these bodies can exercise the powers properly belonging to another, the question whether the legislature could make such division, depends upon the inquiry whether the power of making partition in such a case as this, is exclusively judicial? But without going into the inquiry now how far the legislative act is a record that ought to estop the parties, and inclining to the opinion that it could not estop the heirs of May who were not consulted on its passage, and consequently that it ought not to conclude the other parties, as such estoppels must be mutual, we have no hesitation in viewing the act as strong evidence of a satisfactory nature that the facts recited therein are true, even if it be conceded that the subject-matter was not proper for legislation. Let it be recollected that the different proportions of the partners, as shown by the writings, are as they existed some four or five years before the death of May, and in the aforementioned bond, which he gave to Matthew Patton, he expressed an intention and covenanted to have a greater interest when the bond fell due, which gave him a motive to acquire more than the one twelfth. At the passage of the act Craig and Thomas could not have any motive to represent their interest less than it really was. They told their own story, without any to confront them. They do not appear to be in any manner ignorant of their own rights or those of the heirs of May. It is also evident from the recitals of the act as well as one of the patents which issued wholly to Tabb, whose interest was not conveyed to Thomas for nearly two years afterwards that the interest of Tabb himself had been altered from the manner in which it stood in 1785, when May gave the writing determining the respective interests of the parties. The act, it is true, recites a quantity different from that of the warrants; but still the act is correct, as the quantity there recited agrees precisely with the quantity which was surveyed and patented. Under such circumstances the admissions of Thomas and Craig before the legislature ought to be taken against them, even if the legislature had no power to pass the act. Such an admission in a court of record, which had no jurisdiction of the case, ought to weigh strongly against them.

It is true, it is decided by this court in the case of *Elmendorff* *etc.* v. *Carmichael*, 3 Lit. 472, *ante*, 86, that the recital in a private act of assembly can not be evidence against strangers, or conclude their rights. Still, if admissions were there made against

the parties procuring the passage of the act, such admissions ought to be heard against them, on the principle that their writings and sayings may be used as evidence against them, and not for them. The recitals in such an act, as said in the case before cited, are evidence that facts were so represented to the legislature by the petitioners. It is evidence that Craig and Thomas procured its passage, and that they placed the facts as stated on the legislative records. It ought then to be presumed that J. May had acquired a greater interest, such as the act acknowledges. The allegation in the bill that John and George May's part was laid off by the commissioners together, cannot be sustained. The quantity laid off for excess, the one twelfth which they held according to J. May's original statement, the commissioners had no authority to divide in favor of George May, and their acts contradict the assertion. Besides, if we should conjecture how John May in the mean time had increased his interest, we should rather suppose it came from Tabb than any other partner. It also appears that the parties conveyed to, and acknowledged the lines of the part assigned by the commissioners to John May's heirs, calling it theirs, and for twenty years did not appear to question it; and the idea of lessening it, must have been an after thought, when pressed by the ejection of the heirs of May. We, therefore, conceive that the interest of the heirs of John May ought not to be made less than the act of assembly, and the division under it procured by Thomas and Craig make it, and that there is no necessity or propriety in disturbing, at the instance of Craig and Thomas, the purchasers from them in other parts of the large tract, when John May's heirs do not desire it; and are satisfied with what is assigned, and the court below erred in directing this to be done.

The decree must, therefore, be reversed, and the cause be remanded, with directions to the court below there to dissolve the injunction, and dismiss the bill, with costs.

The parties who were defendants in the court below, to wit, the heirs of John May, Chambers, Paxton, and Key, must recover in this court the costs of both appeals.

A petition for a rehearing was overruled.

EXECUTION OF POWER BY ATTORNEY.—The criterion by which to determine whether a power contained in a devise or other instrument can or cannot be executed by attorney is this: If a personal trust or confidence is reposed in the donee of the power, plainly requiring the exercise of his discretion and judgment, he cannot delegate the execution of it to an attorney; other-

wise he may. The nature of a power which cannot be thus delegated is well described in 1 Sugden on Powers, 213: "Wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare*." This is unquestionably the settled doctrine of the cases: *Berger v. Duff*, 4 Johns. Ch. 363; *Hawley v. James*, 5 Paige, 318; 487; *Pearson v. Jamison*, 1 McLean, 197; *Singleton v. Scott*, 11 Iowa, 589; *Saunder v. Webber*, 39 Cal. 287; *Alexander v. Alexander*, 2 Ves. 642. And see Hill on Trusts, 489; Story on Agency, sec. 12.

The distinction taken in the principal case between a naked power and a power coupled with an interest, does not seem to be the governing test upon this point. Notwithstanding the fact that the legal estate may be in the donee of the power, if there is a manifest reliance upon his discretion and judgment, he cannot refer the execution of the power to an attorney. Thus, in *Saunder v. Webber*, 39 Cal. 287, the property was conveyed to trustees or assignees, who were empowered to sell "either at public or private sale, to such person or persons, for such prices and on such terms and conditions, and either for cash or upon credit, as in their judgment may appear best and most for the interest of the parties concerned;" and it was held that the power, being discretionary in the trustees, could not be executed by attorney. So, in *Pearson v. Jamison*, 1 McLean, 197, a power to an executor was thus expressed: "I hereby give to him a full and complete power and authority to dispose of the real property aforesaid, in the best mode he may find convenient or may judge proper," etc.; and it was held that notwithstanding the fact that the power was coupled with an interest, it could not be executed by attorney. In the light of these decisions it is questionable whether the power given to the executors in the principal case was such as could be executed by attorney. The power was given "for the purpose of selling as much" of the property, "as will pay all my debts of every kind." Here seems to have been a reference to the discretion of the executors, at least, in determining whether a sale was necessary. Perhaps, however, where the executors had determined the necessity, they might properly delegate to an attorney the mere ministerial act of selling. The doctrine is, that it is the discretion only which cannot be delegated; and where that is reserved to the donee of the power, other acts necessary to the execution may well be performed by attorney: *Hawley v. James*, 5 Paige, 487. Thus, in *Singleton v. Scott*, 11 Iowa, 589, land was conveyed in trust to secure the payment of a note executed by the grantor to the grantee, and a power of sale was given as follows: "If the said Michael Singleton shall fail to pay the sum of money, or any part thereof, when due, then the said Thomas Scott shall, after having given notice by three weeks' publication in the newspaper, proceed to sell at the door of the court-house of Jackson county, at public auction, for cash to the highest bidder, the above-described real estate, and is hereby authorized and empowered to execute to the purchaser at such date all deeds," etc. The trustee assigned the note to another, and the assignee, upon non-payment of the note, at maturity, gave notice of the sale by publication in a newspaper. The sale was, however, conducted by Scott, and he gave the deed to the purchaser. Upon objection being made that the power of giving the notice could not be delegated, it was held that this was not an act involving discretion, and that the power was well executed.

But "where the power is tantamount to an ownership, and does not involve any confidence or personal judgment, and no act personal to the donee

is required to be performed, it may be executed by attorney, in the same manner as a fee-simple may be conveyed by attorney:" 1 Sugden on Powers, 215, and cases cited.

A POWER GIVEN TO A FEMALE-COVERT as executrix, may be executed by her alone, without joining with her husband: *Tyres v. Williams*, 6 Am. Dec. 663.

RECITALS IN PRIVATE STATUTE AS EVIDENCE.—Facts recited in a private statute, though not conclusive, are *prima facie* evidence against the party at whose instance and for whose benefit the act was passed as well as against the state, but not against strangers: *Elmendorff v. Carmichael*, ante, 86; Wharton on Evidence, sec. 636; Cooley on Const. Lim. 96; *State v. Beard*, 1 Ind. 460; *Lord v. Bigelow*, 8 Vt. 445; *Parmeles v. Thompson*, 7 Hill, 80, and note; see, also, the English cases cited in Wharton on Evidence, sec. 636.

RUST v. LARUE.

[4 LITTELL, 412.]

PERSONAL TRUST REPOSED IN COUNSEL.—The employment of counsel implies a personal trust and confidence, which he cannot delegate to another.

DUTIES OF COUNSEL, IMPORTANCE OF.—The preparation of a chancery cause for trial is the most important of a counsel's duties, and the argument is among the least important.

EMPLOYING SUBSTITUTE TO MAKE ARGUMENT.—Where a counsel having fully prepared his cause in the inferior court, and being prevented from arguing it through illness, paid counsel selected by his client, in his absence, his full fee for arguing it, and the cause terminated successfully, it was held that the counsel's duty was fully performed.

CHAMPERTY AND MAINTENANCE being offenses both at common law and by statute, contracts of that character made by counsel will not be enforced in equity, either in his behalf or in that of his assignee; so, even though they were not void at law.

CHAMPERTY BEFORE SUIT COMMENCED.—It is not necessary to render a contract champertous that there should be a suit commenced at the time.

COMPENSATION NOT FORFEITED BY CHAMPERTY.—A counsel does not forfeit his right to full compensation for services by entering into a champertous contract; and where, from his client's insolvency, a suit at law would be fruitless, equity will take jurisdiction, and decree compensation out of the property recovered.

APPEAL from the circuit court. The opinion states the case. *Crittenden*, for the appellant.

Haggin and B. Hardin, for the appellee.

By Court, MILLS, J. Rust, the present appellant, filed his bill against Larue, the appellee, for the purpose of redeeming some slaves and other articles held by Larue as a pledge. The court below sustained the claim of redemption, and on an ap-

peal to this court the same right was sustained; but the cause was reversed for some errors in the details of the decree, at the Spring term, 1817, in the report of which a full history of the transaction is given. After the cause was returned to that court, and commissioners were appointed to take an account of the money due, the hire of the slaves and costs of the maintenance of the young and infirm, Larue obtained leave and filed a supplemental answer, alleging that Rust had, at the commencement of the suit, employed Benjamin Hardin, esq., as his counsel, and by a written contract had engaged to give him in case of success, one third of all the slaves or money that might be recovered, as a compensation for his services, which Hardin had performed; and that he had purchased the contract from Hardin for a valuable consideration, since the rendition of the former decree of this court; and he exhibited the contract and the transfer thereof, and made Hardin and Rust defendants to this answer as a cross-bill, and prayed that after the account was taken and settled, he might be permitted to retain one third of the recovery in his hands, in satisfaction of this contract.

To this, Rust answered, admitting the contract with Hardin, and alleges that he was so poor when he made it that he had to give it for the purpose of obtaining counsel for a contingent fee, as one hundred dollars was charged by other counsel to whom he had spoken, but he alleges that Hardin abandoned the cause in the court below, and at the trial was absent in congress, and he had to sell his interest in the suit to his sons for the purpose of raising money to carry it on, and then had to pay another counsel fifty dollars to argue the cause; that after he had obtained the decree his adversary had appealed; that by the contract with Hardin, he was to follow it through all the courts to which it went, and was to appear in the court of appeals for him, but did not appear; that he met with Hardin at Frankfort, during the term of that court at which the cause was tried, before it came on, and applied to him to stay and argue the cause; but Hardin refused and would have nothing further to do with it, and left this state, on his way to congress, before the cause was reached, and he had to employ other counsel, for large fees, and that he had never recognized Hardin as his counsel afterwards. He alleges that he is willing to pay Hardin a liberal compensation for his services, but resists the dividing of what was recovered, and contends that it is unreasonable and ungenerous to ask it. To this response he makes Hardin a defendant as well as Larue.

Hardin answered, admitting the transfer of his contract to Larue, and denying that he ever engaged to pursue the cause through this court, in which he then never attempted to practice, and avers that his undertaking was confined to the court below, and that there he had wholly conducted the cause, and had extended his services to taking depositions, and other things not within the purview of his duty as counsellor or solicitor in the cause, until the whole preparation was completed. He denies that he ever abandoned the cause, and alleges that the only color to such an allegation was that Rust was imprudent in talking about the suit during its pendency, and he was afraid that, as the case rested much on parol testimony, Rust would, by his idle talk, destroy the suit, as he was aware that the opposing party was watching the conversation of Rust, to obtain from him some confession; and to prevent this, he had threatened Rust, if he did not quit his chattering about the cause, he, Hardin, would abandon it; but never did so, as he made the menace to restrain Rust, and for his benefit. He admits that he met with Rust in Frankfort, during a recess of this court, at the term when the cause was tried, and that Rust proposed his staying for the purpose of arguing the cause, and that he refused to do it, reminding Rust that his contract did not compel him to do so, and that his official duties in congress then required his attention there, so that he could not, and did not stay. He admits his absence when the cause was first tried in the court below, but avers that the cause was fully prepared, and that he had engaged Charles A. Wickliffe, esq., a professional gentleman of acknowledged talents, to argue the cause in his stead; but Mr. Wickliffe was prevented from attending the court by sickness; that afterwards, discovering that Rust had employed other counsel, he immediately took up and discharged the note for forty dollars given as a fee, and offered to pay Rust the remaining ten dollars, which had been paid; but Rust refused to receive it. He exhibits this note in court, and also the ten dollars to be delivered to Rust. He avers that Rust brought to him the opinion of the appellate court, which he had caused to be entered, and the necessary orders made to complete the cause, and he afterwards on the application of Rust, or son, wrote a notice of the meeting of the commissioners to take the account, and attended on the day; but the attendance of the commissioners was not procured by Rust, and that from that time Rust, through some advice he had received, first conceived the

intention of defrauding him out of his contract, and procured other counsel; but he nevertheless obtained a final decree.

The court below first decreed to Rust two thirds of the slaves, and to pay two thirds of the mortgage money due, and retained the cause as to the remaining third, to abide the contest now raised between Hardin, Rust, and Larue; and finally, on the hearing of that controversy, decreed in favor of Larue, that he should retain the remaining third in discharge of the contract with Hardin. From this decree Rust has appealed. It is now contended for the appellant that after the cause had progressed through this court, and a decree was here directed in the court below, the attitude of the parties could not be altered, and that it was incompetent for Larue to introduce or set up any claim which might prevent him from restoring the slaves.

Whether a bill of review will lie to a decree directed by this court, it is unnecessary now to inquire, as the answer of Lane, filed after the return of the cause from this court, does not seek to review or change the decree. That Lane could not set up any claim calculated to defeat the decree against him, in whole or in part, which he might have set up before the final hearing, is readily admitted; but his answer now under consideration is not of this character. It yields to the principles of the decree as settled by this court, and is in affirmance of them, and claims the one third as the purchase of the benefit of it. Although this answer is styled by the writer an amended answer, yet it is not entitled to that name. It is purely supplemental, and alleges facts which have occurred since the decree, and shows that according to the principles of the decree, by subsequent events, he is entitled to one third. Suppose that Lane had purchased out the whole decree from Rust himself, or had, by operation of law, become entitled to the slaves, could it be contended that Rust must still go on and obtain the decree, and take from him the estate? We conceive not; and we perceive no impropriety, according to the settled rules which govern courts of equity, in permitting Lane to set up the matter alleged, for the purpose of retaining the slaves in his own hands, if his claim is otherwise good. We will then proceed to examine the facts set up by the defense of Rust. The writing between Rust and Hardin is signed by Rust alone, and contains the stipulations on his part in full; but barely recites that "whereas he had employed B. Hardin to bring a suit in chancery for him, in the Hardin circuit court, against Lane," etc.; and does not set forth the extent of Hardin's engagement; or, if

it does, it evidently did not compel him to pursue the cause in this court. One witness is produced to prove what his undertaking was. His deposition is taken twice, and in neither is he asked the question, whether there was any explicit engagement to pursue the cause to the appellate court; but in both he says, "he thinks Hardin was to attend throughout the whole course of law." Whether his thinking is only an inference, or an awkward mode of stating the fact, the testimony is quite too weak, according to a well-settled rule, to overturn the positive denial of Hardin's answer in direct response to the charge of his adversary. Of course, the contract must be taken not to extend to the prosecution of the cause in this court, and any objection to the performance of the contract, on account of Hardin not pursuing the cause, must be unavailing. The allegation that Hardin abandoned the cause in the court below is likewise not supported by proof. The evidence adduced on that point agrees with the answer of Hardin, that he threatened to do so, if Rust would not leave off his imprudent conversations and confessions. Besides the recognition of Hardin as the counsel, long afterwards, by placing the opinion of the appellate court in his hands to procure a decree in conformity with it, and procuring him to write a notice for the meeting of the commissioners, strongly conduces to show that both the preceding objections were after-thoughts, and not at first intended.

The last objection relied on is Hardin's absence in the court below at the first argument. It is shown that he had provided an able substitute, who was prevented from attendance by sickness, and that he did discharge the note given to the one employed, and has produced in court the ten dollars paid in part of the fee. It is contended, notwithstanding this proof, that the engagement on the part of Rust was based on a personal trust and confidence in the talents of Hardin, which could not be supplied by substitution. It cannot be denied that engagements with counsel are of that nature, and cannot be supplied or fulfilled by anything but personal service. It, however, clearly appears that the cause in its commencement, preparation and management until its final readiness for trial, was conducted by Hardin, and that this is the most important duty of counsel to the client in a chancery cause, is well known to every one who possesses any knowledge of the preparation of causes, and the argument in court is the least important duty, and when we consider that Hardin had provided for this, and his provision failed through sickness, and that he has dis-

charged the fee of the one selected by the appellant himself for that purpose, we conceive no real injury can have resulted to the appellant, who gained all he claimed, and has lost nothing, and that this ought not to be made a valid objection to a fulfillment of the contract.

It is further urged on the part of the appellant that the fee is enormous and unconscientious, and therefore ought not be enforced by the chancellor. To this we answer, that the prospect of success was very doubtful, and so proved in the end, and that Hardin risked all his services in a doubtful cause, which has remained so long in contest as to rise much in value, and we cannot say, as the compensation was wholly contingent, that it is too enormous to preclude the aid of a chancellor. It is finally contended that the contract was made between parties standing in the relation of counsel and client, and that one made in such an attitude of confidence cannot be supported. It is true, such contracts are viewed with a jealous eye by the chancellor, and many such have been set aside, and counsel compelled to accept a reasonable compensation for their services. Most of the cases, however, which exist of this nature will be found to be concerning contracts made after counsel was engaged, and before the termination of the suit. The question then is, can the contract made at the first employment be subject to the same rule? We perceive no good reason why it should be. At that time counsel cannot be supposed to have acquired such an ascendancy over the client as to inveigle him into a contract dangerous to his interest. The client is then free to contract or refuse it. The counsel set his price on his services, and the client may give it or apply to another, and the consent of the client to the terms is that which constitutes the relation. Every contract made with counsel at his first engagement must be sealed and brought to a *quantum meruit*, and his right to stipulate either for a certain or contingent compensation would be wholly destroyed if the rule must be applied to the bargain made at the first undertaking. We, therefore, conceive, as no unfairness is shown in obtaining this contract, but it was the best the employer could do, according to his own history of the transaction, as others charged him a greater certain fee than he was able to give, that the contract ought not to be set aside on this ground.

But we cannot dismiss this contract without considering another objection to it, which has not been expressly made and debated at the bar, and which is of a still more serious nature.

It is clear that the supplemental answer of the appellee, setting up the contract, must be considered as a bill for specific performance, and the circumstance of the writing being assigned to the person who holds the possession of the estate to be divided, cannot place him in a better attitude than the original holder stood. The ancient and long neglected, but still valid, provisions existing at law against champerty and maintenance must bear against it. Champerty, which is maintenance of the strongest character, is nothing else than an agreement to aid in a suit and then divide the thing recovered; and there is no doubt that this contract fully comes up to this definition. It is true the answer of the complainant below does not expressly make this point; but every fact suggested or alleged about it in the pleadings of all the parties, as well as the writing itself, shows that it is an agreement of this character. Can the agreement, then, be specifically enforced. The doctrine is well established that equity will not carry into effect an agreement against the policy of the law any more than one against its morality. It is not necessary that we should discuss the question, whether champerty be or be not an offense against morality, or only a prohibited act. Be it whichever it may, precisely the same consequences follow. Suffice it to say, that it was an offense at common law, before any statutory provision on the subject: 5 Com. Dig. 16 tit. Maintenance. Statutes were adopted to enforce the provisions of the common law by proper penalties, and these statutes are still in force, at least as to personal estate, and will be found in 1 Dig. L. K. 213. It is true these statutes do not, in so many words, declare all such contracts void; but their bare directions that such agreements shall not be made, bring the case within the general rule before laid down, and the chancellor will, and ought to shrink from perfecting the agreement, and leave the party to his remedy at law. On principle, then, this point is against this contract; and on the score of authority it cannot be enforced: See 1 Mad. Ch. 325; *Powell v. Knowler*, 2 Atk. 224.

The decree, therefore, dividing this property must be reversed, with costs, and the cause remanded, with directions to the court below to decree to the original complainant in that court, the redemption and possession of the remaining third of the slaves, on the same principles as the other two thirds have been decreed, leaving the validity of the contract to be hereafter tested in a court of law, if the parties resort to that mode.

A rehearing having been granted, this opinion was approved and ordered to stand unaltered.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

DAVID v. SETTIG.

[1 MARTIN, N. S. 147.]

HEARSAY EVIDENCE.—The declarations of a father made before the cause of action arose, concerning the age of his child, are admissible in evidence.

APPEAL from the court of the parish and city of New Orleans. The opinion states the case.

Seghers, for the plaintiff.

Davezac, *contra*.

By Court, MATHEWS, J. This suit was brought on two promissory notes executed by the defendant in favor of the plaintiff. The former pleaded infancy, and consequent incapacity to contract any binding obligation; he obtained judgment, from which the latter appealed. The notes given in evidence by the appellant are dated one in September and the other in November, 1819. In support of his plea of infancy, the appellee offered a passport signed by his father, wherein he states himself consul of his majesty the King of the Netherlands, dated in 1817. In this instrument, the son is stated at that time to have been seventeen years old, and its genuineness is ascertained by proof. Oral evidence was also tendered to prove his youthful appearance and boyish conduct during his voyage to New Orleans and subsequent to that period, and likewise that the fact of his minority at the time of making the promissory notes on which this action is founded was known to the plaintiff. To the introduction of all this testimony a bill of exceptions was filed, as being contrary to the general rule of evidence, which requires the best that the nature of a cause admits. The passport signed by the father is also opposed on the ground of his incompetency to testify, as established by our code.

It is true, that, according to our law, ascendants and descendants cannot be witnesses for or against each other: Civil Code, 312, art. 248. The most obvious reasons on which this rule is founded, are danger of perjury on account of improper bias; and the inhumanity of arraigning as witnesses parents against their children, or children against their parents. But in the present case, it is not attempted directly to introduce the father as a witness. Evidence is offered only to show what he has declared and written, in relation to a fact, completely within his knowledge, and which was uttered at a time when he stood without temptation to evade or fall short of the truth. In pursuance of this doctrine, contrary to the general rule that hearsay is not evidence, memoranda made in bibles, or any other family registers, and even public reputation are received as good proof of births and pedigrees. See Phil. Ev. 473, Am. ed. of 1816.

It is true that the law of the country under which these exceptions to the general rule are tolerated, does not render ascendants and descendants incompetent to testify for or against each other. But the reasons on which they are founded, viz., necessity or the frequent impossibility of procuring better evidence, and great probability of the truth of facts thus recorded or declared, arising from the unbiassed state of mind in which they are uttered, appears to us to be equally forcible under our own law. Parochial registers, in countries where by law they are required to be kept, are perhaps the most authentic and best evidence of births and pedigrees; but it does not appear that such is the law or custom of the kingdom in which the defendant was born; and even if it did, it is clear that the testimony on which registries of that kind are commonly made, is the declaration of the father or mother, and receives credit on the ground that they were best acquainted with the fact, and declare it free from improper bias or temptation to falsify. In the absence of this higher species of evidence, courts of justice are in the habit of resorting to hearsay and public reputation, in relation to such matters; and we are of opinion that the parish court did not err in receiving the testimony offered in the present case on the part of the defendant. Being received, it supports his plea of minority and consequent incapacity to contract in the manner alleged by the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be affirmed with costs.

BAUDIN v. ROLIFF.

[1 MARTIN, N. S., 165.]

JUDGMENT OF NONSUIT OR DISMISSAL will not support a plea of *res judicata*.
EVIDENCE, JUDGMENT.—Where a judgment is part of the muniments of an estate, it may be given in evidence without the proceedings on which it is founded.

RES JUDICATA.—Strangers to a judgment can not avoid its effect by showing that it was erroneous, nor by relitigating the issues which have been decided.

SHERIFF'S SALE—PAYMENT OF BID.—The judgment-creditor may waive the payment of the bid, and receipt for the purchase-money without payment in cash, and if so the sale is valid.

A VENDEE'S CONSENT to a conveyance may be shown *dehors* the instrument, as by his afterwards conveying part of the same land.

FRAUD IS NEVER PRESUMED, and if a deed be alleged to be fraudulent, the allegation can be sustained only by showing fraud in both the vendor and the vendee.

APPEAL from the court of the third district. The opinion states the case.

Preston, for the defendant.

Moreau, *contra*.

By Court, PORTER, J. The petitioner alleges that in the year 1817, he recovered judgment against the heirs of Philip L. Alston, for the sum of five thousand three hundred and sixty dollars, with interest at five per cent. from the sixteenth of February, 1814, and that the said sum was ordered to be made out of a tract of land containing one thousand arpents, situated on the bayou Tunica. That this amount of five thousand three hundred and sixty dollars was bid by the ancestor of the heirs, on the fourteenth of August, 1802, for the tract of land at that time, and by subsequent proceedings of John O'Conner, alcalde of the fourth district, sold as the property of Oliver Pollock; that it had been since sold in due form of law to the petitioner, in virtue of his judgment against the heirs of Alston, for the sum of four thousand four hundred and ninety dollars, by reason of which he had acquired a title to the premises, and had been put in possession of the same. That certain persons, viz., Oliver Roliff and others, had illegally entered on the premises, and though often requested, had refused to remove therefrom. Samuel Robertson and wife filed their bill of intervention, in which they stated that they were the lawful owners of five hundred acres of land, situated in the

parish of Feliciana, the title to which they acquired in the following manner: That a certain Oliver Pollock, being the proprietor of two thousand acres of land, situated on the river Mississippi, including the mouth of the bayou Tunica, did, on the twenty-third of May, in the year 1801, by deed of conveyance, legally and duly execute, sell and dispose of the said tract of two thousand acres, to a certain Janett Pollock; that afterwards, on the fifteenth of September, 1802, the said Janett Pollock sold the undivided half to a certain Lucilla Pollock, who by last will and testament devised the undivided half of this portion owned by her to Mary S. Robertson, one of the petitioners. After thus exhibiting the nature of their title the interpleaders go on to state that they may be injured by the proceedings carrying on against the original defendants; they, therefore, pray leave to intervene, be made parties, and that the right to the land and possession of it may be decreed to them.

They were admitted as parties, and subsequently filed the following pleas: That Baudin had not a good title to the premises; that they, the interpleaders, had, and that in addition thereto they held the land by ten years' prescription. The cause was submitted to a jury who found a general verdict for the plaintiff, there was judgment accordingly, and the defendant appealed. In this court it has been contended by the plaintiff that all the matters and things now in contest between the parties in this action, have been definitively settled in a former suit. The decree, which is contended to have that effect was given in an action in which the present plaintiff sued the heirs of P. L. Alston, to compel them to comply with a purchase made by their ancestor, of a certain tract of land, sold to satisfy the judgment he had obtained under the Spanish government against O. Pollock. In his petition, the plaintiff alleged that the reason why Alston had not complied with his contract, was that certain persons, and among others the interpleaders in this cause, had set up a title to the premises, and he prayed that they might be compelled to produce their title, if any they had, in order that it may be adjudicated on, and that they might also be compelled to deliver up possession of the premises as the property of Oliver Pollock.

To this petition, the parties now intervening put in a defense, containing a general denial of all the allegations therein. On the issue thus joined, the court decreed that the petition should be dismissed, and the defendants have judgment against

the plaintiff for costs of suit. The plea of *res judicata* is not sustained by this judgment. If it was at all final, it was in favor of the defendants, not against them; but we consider it one of nonsuit, which settled nothing but the costs in that cause, and left undecided all questions growing out of the pretensions of the respective parties. After this judgment, we find another on the record for the defendants generally. Whether the parties against whom the petition had been dismissed were included in this, and the appeal taken from it, we cannot discover; but considering it as if they were, the result is the same; for the judgment of the district court on the second trial, after the cause was remanded, is confined expressly to the matters in dispute between Baudin and the heirs of Alston, and reserves the rights of all the other parties.

Proceeding, therefore, to examine the case on its merits, the first thing to be inquired into is the title of the plaintiff. He shows a grant from the Spanish government to Trudeau for the premises, and a sale from Trudeau to Oliver Pollock, and so far no particular objection has been made. The next link in the chain, it is contended by defendants, is wanting, and they object that the foundation of the plaintiff's claim is the proceedings had in the year 1802, against O. Pollock, and that, instead of producing a copy of these proceedings, he has only offered in evidence the judgment which was the result of them. We are, however, of opinion that it was not necessary for the plaintiff to do so, and that when, in tracing title, a judgment makes a part of "the muniments of an estate," that it is not necessary to give in evidence all the proceedings on which it is founded. We cannot, indeed, see on what ground, or for what useful purpose, it could be required. If the appellants held the property in right of Oliver Pollock, we could not inquire collaterally into the merits of the judgment: *Dufour v. Camfranc*, 11 Mart. 604 [13 Am. Dec. 360]. If they are strangers to him, there is still less reason to permit them to assert his privilege, or dispute the validity of the judgment against him. It is not introduced as binding *per se* on their rights, but as an introductory fact necessary to make out the chain of title. We do not know that Pollock himself would oppose it, so that third parties might in this way obtain a benefit for a defendant, that he did not wish to profit by himself, but we understand the rule to be *invito beneficium non datur*: Dig. liv. 50, tit. 17, l. 69.

The same answer must be given to the third objection, as to whether the attorney in fact, who represented Pollock, was

regularly authorized to do so, and to that which complains that it is not shown that Conway was subrogated in Baudin's rights. The evidence on which the Spanish tribunal directed the property to be sold to satisfy both the balance due Baudin on the judgment, and the money which the surety had already paid, is not before us. We must presume, until the contrary is shown, that Conway was duly subrogated in the rights of the creditor he had paid, more particularly when that creditor joins in a petition that a sale should be made to satisfy the surety. The appellant has doubted whether such subrogation could be made under the Spanish law, but it appears quite well settled that it could: *Curia Phillipica*, lib. 2, c. 6; *Cesion*, nos. 40, 43. It is next urged that there was a novation of the debt due, and we have been referred to several documents from the one hundred and eighty-fifth to the one hundred and ninety-fifth pages of the record in support of this position; but on examination we see no ground whatever for it to rest on. The first instrument is one in which the obligor expressly binds himself as surety for the principal debtor Pollock. The second is the security furnished by the executor of Conway, in consequence of having all the property adjudicated to him; and the third is a change in the surety furnished by the executor. Even if they had operated as a novation, that might have been a question between Baudin and Pollock, but cannot be agitated now. Such a doctrine would render it nearly impossible to find bidders at sheriff sales. For men would not buy property under the obligation to enter into all the questions discussed on the trial between plaintiff and defendant, and try the cause over again in which the execution issued.

The next objection, and that mainly relied on by the defendant, is that the right, title and interest of Pollock to this land never passed to Alston, the purchaser, and consequently that Baudin, in buying Alston's right, did not acquire a good title to the premises in question. In support of this position it has been principally contended that Alston bought the land on a judgment in favor of Baudin and Conway, that he never paid the price, and that not having done so, the title was not in him, as it did not pass by the adjudication without the payment of the purchase-money. That the payment of the price by the bidder at a cash sale by a sheriff, is indispensable to a transfer of the property if required by the plaintiff at whose suit the sale takes place, we concede. But this condition is one which is introduced for the benefit of the person to whom the money

is to be paid, and consequently may be waived by him if he thinks fit. If he chooses to give a receipt for the sum for which the property sold, and acknowledge satisfaction on the execution, the title will vest in the buyer, although the latter may have given his obligation to pay at a distant day, or even have obtained a lease without making any payment whatever. We regard the payment as a question entirely between the person at whose suit the property is sold and the bidder, one with which the owner of the property has nothing to do except to insist that their arrangements shall not deprive him of the right to be credited on the judgment for the amount for which the property was stricken off. The plaintiff under a judgment in his favor, like the vendor by private sale, may release the purchaser, if he chooses, provided he gives the defendant the benefit of the proceeds. The right to abandon the price altogether implies that of modifying it as he chooses.

In the case now before us, Baudin, either from circumstances over which he had no control, or from other reasons, let a number of years elapse, before he brought suit to make the vendee comply with his contract, but in that suit he obtained judgment against him for the price. This surely was an affirmance of the sale, for it was a claim to have the benefit of it. An execution issuing under this judgment might equally be satisfied out of the land which formed the consideration of the contract on which that judgment was rendered. For the title vested in the buyer the moment the plaintiff had his demand to enforce the sale, sanctioned by a judgment of the court. The case of *Durnford v. Degruy's Syndics*, 8 Mart. 220, contains nothing contrary to this, for there the plaintiff insisted on having the benefit of the forfeiture created by the buyer's failure to comply with his bid, and claimed the right of selling the property again. The observations of the court must be understood in relation to the facts then before them. It is contended that the land was sold at the suit of Conway and Baudin; that Baudin alone brought an action against the purchaser, and that it required the plaintiff to show that both the persons for whose benefit it was disposed of, should have affirmed this contract by suing for the price. The judgment of the Spanish tribunal was that the premises be sold to pay Baudin what was due of the original judgment, and to satisfy Conway, the surety, for what he had already paid for Pollock. As the amount which Baudin has received does not appear to exceed the balance due him, we think there

is not any weight in this objection. Conway could only claim a share in the execution in case of an overplus.

Disposing of these objections brings us to the title of the defendants, and the question which arises on it, is one of greater difficulty than any other the case presents. They claim under a sale of the premises from Oliver Pollock to Janett Pollock, dated on the twenty-third March, 1801.

The sale is attacked by the plaintiff on several grounds: 1. Because the vendee's assent to the conveyance is not given in the instrument by which the land is sold to him. This objection, we think, unfounded. Consent may be shown by evidence *dehors* the instrument, and in this case it is proved by the buyers, afterwards conveying part of the premises, and declaring they were the same which he had acquired by deed from O. Pollock: *Bradford's Heirs v. Brown*, 11 Mart. 217; 2. Because it was made under circumstances which render it subject to a just suspicion of being done with a fraudulent design. Admitting this to be proved, we would not be authorized to annul the sale; it is not a just suspicion of fraud, but fraud itself, that should be the result of the evidence.

Whether the sale was fraudulent or not, is the main subject of inquiry. If it was not, it appears to us to have legally passed this title to Pollock, antecedent to the sale to Alston. If it was, the defendants are without title. Fraud is never presumed, except in cases of bankruptcy; it must be proved, and it must be proved both in the vendor and vendee, with the additional circumstance that the alienation has produced an injury to creditors. The facts from which it may be justly inferred, it is impossible to state. Each case must depend on its own circumstances. In this before us, we are unable to say that it has been satisfactorily established. We are prevented from acting on this conclusion and giving judgment accordingly, by reason of a verdict obtained by the defendant in the court below. It has been repeatedly decided in this court that in cases where fraud was put at issue, we should readily yield our conclusion to that which twelve of our fellow citizens, hearing the witnesses, and knowing the parties, had formed on the same matter. The difficulty of acting in obedience to this rule in the instance before us, arises from the loose manner the pleadings are made up. It does not appear from them that fraud was alleged or denied, though from the proof adduced, and the course the cause has taken, it is extremely probable it was submitted to the jury and entered into the consideration on which their verdict was

founded. Under these circumstances we think the safest course we can adopt is to remand the cause for a new trial. The opinion now delivered on the various points made respecting the written title of each party will probably narrow the inquiry on the next investigation to the single question whether the conveyance from O. Pollock to J. Pollock was fraudulent or not. On such an issue, a jury are so emphatically more competent than this tribunal to arrive at the truth, that justice to the parties requires the case should be acted on by that body.

The plea of prescription does not appear to us to be sustained; the record shows that a suit was pending in the beginning of the year 1803, between Hamilton Pollock, in behalf of Janett Pollock, and the present plaintiff, in regard to this land, and we cannot learn that it was terminated ten years before the suit commenced by Baudin in the year 1814. The fact of possession, also, is not so clearly established as it might be; but admitting that it is fully made out, the pendency of the suit interrupted the prescription.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that this case be remanded for a new trial and that the appellee pay the costs of appeal.

ADMISSIBILITY IN EVIDENCE OF A JUDGMENT WITHOUT THE JUDGMENT-ROLL.—In *Mason v. Wolff*, 40 Cal. 246, it was decided that the judgment and findings were not competent evidence, unless the judgment-roll was offered in connection with them, from the inspection of which it could be seen whether the court had jurisdiction to render the judgment. The rule seems to be that where a record is used in evidence, it must be produced entire. The courts of other states, however, recognize exceptions to this rule. In *McGuire v. Konns*, 7 Monr. 386, the court say: "Where a record is used as evidence to prove the facts therein contained, the rule well applies; but where it is only used, as it is here, to show the fact that there was such a judgment, then so much of the record as is relevant is frequently permitted to be used. Here the fact to be shown was that there was such a judgment to warrant the execution, and enough of the record is produced to establish that fact." This language is quoted and approved in *Lee v. Lee*, 21 Mo. 531, which was a case in which the judgment was offered to support an execution under it, and it was held unnecessary to offer the entire record. An exemplification or other proof of the judgment, etc., was held "sufficient in itself, without proof of the other proceedings;" *Locke v. Winston*, 10 Ala. 849; *Smith v. McGehee*, 14 Id. 404; *Henderson v. Cargill*, 31 Miss. 367; *Haynes v. Cowen*, 15 Kana. 637. In the last case the court say: "Indeed it would seem useless and unnecessary, or even worse than useless and unnecessary, to introduce in evidence such portions of the record as may be entirely irrelevant." It was held, in *Chinn v. Caldwell*, 4 Bibb, 543, that entire copies of the judgment are sufficient without the rest of the transcript. "The plaintiff hav-

ing shown a judgment of a court of competent jurisdiction, an execution issued thereon, and a sheriff's deed to the property, made under that execution, the presumption of law is, that the proceedings have been legally conducted:" *Mithoff v. Devese*, 9 La. An. 550; *Maskell v. Merriman*, 9 Rob. (La.) 69. In *Gardere v. Columbian Ins. Co.*, 7 Johns. 514, a sentence of a court of admiralty was held to be sufficient evidence, without showing the previous proceedings. In an action on a wager that a decree of chancery would be reversed, a copy of the judgment of reversal was held to be admissible: *Jones v. Randall*, Cowp. 17.

ON WAIVER OF PAYMENT OF BID BY PLAINTIFF IN EXECUTION.—In Indiana a deed issued without exacting payment of the bid is void: *Chapman v. Harwood*, 8 Blackf. 82; *Ruckle v. Barlow*, 43 Ind. 274. But the better opinion is, that "the plaintiff should be allowed to accept payment in any manner satisfactory to himself:" Freeman on Executions, sec. 300; *Lane v. White*, 12 Wis. 381; *Russell v. Gibbs*, 5 Cow. 390; *Nichols v. Ketcham*, 19 Johns. 92; *Morgan v. People*, 59 Ill. 58. In the last case it is said, "the execution is the process of the plaintiff, and he has the right to control it." In *Lane v. White*, *supra*, the purchaser showed the sheriff a note from the plaintiff's attorney, stating that the bidder was satisfactory, but the sheriff, notwithstanding, resold the property, because the bidder could not pay the price down; an order confirming the re-sale was reversed by the supreme court.

McLANAHAN v. BRANDON.

[1 MARTIN, N. S. 321.]

NOTICE TO INDORSER may be excused if his residence is unknown and he cannot, after due diligence, be found.

APPEAL from the court of the first district. The opinion states the case.

Livermore, for the plaintiffs.

Livingston, *contra*.

By Court, MATHEWS, J. This is a suit against the indorser of a bill of exchange, which was regularly protested for non-acceptance. The defendant opposes a recovery on two grounds: 1. Insanity; and, 2. Want of due notice of the dishonor of the bill by the drawer. Judgment was rendered against him in the court below, from which he appealed.

As to the first ground of defense, the evidence in the case leaves doubtful the existence of any mental derangement in the defendant, except that which occasionally occurs from intoxication. But should it be admitted that he is insane, and yet left to manage his affairs, still it is uncertain, under such circumstances, what legal effect that state of mind could have on his contracts. However, as we are of opinion that he ought to pre-

vail on his second ground of defense, it is deemed unnecessary to examine the fact.

The holder of a bill of exchange or promissory note is bound to give notice to the drawer and indorsers of non-acceptance or non-payment as the case may be. In presenting a bill for acceptance, when it is refused, the drawer and indorsers are by law entitled to immediate notice of such refusal. This may be excused, in some particular instances, in relation to a drawer, when proof is made that he had no funds in the hands of the payee, etc. But it is believed that due notice to indorsers is, in all cases, indispensably necessary. A delay in giving notice is sometimes excused by the absconding of either drawer or indorsers. A holder of a bill may also be excused for not giving regular notice to an indorser, whose place of residence is not known to him, provided he used reasonable diligence to discover where the indorser may be found. In the present case, notice was directed to Natchez, to both drawer and indorsers, being the place where the bill was dated. But the evidence in the case shows that the indorser against whom this action is prosecuted, resides forty or fifty miles from that place, and within a mile or two of a post-office kept at Pinkneyville, in the state of Mississippi. Nothing in the record shows that any diligence was used, or inquiry made by the holders of the bill to find out the residence of the indorser.

We are, therefore, of opinion that the plaintiffs have failed to make out their case. See, in support of the doctrine here laid down, Chit. on Bills, ed. 1821, pp. 257 and 275; 12 Mart. 181.

And, therefore, it is ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that judgment be here entered as in case of nonsuit, the plaintiffs to pay costs in both courts.

WHAT WILL EXCUSE NOTICE TO INDORSER.—Where the bill is drawn, or the note made, for the accommodation of the indorser, want of notice to him is excused: *McVeigh v. Bank of the Old Dominion*, 26 Gratt. 785; *Keyes v. Winter*, 54 Me. 399. When "presentation and protest waived," or words of similar import are written in the bill or note, notice to the indorser will be unnecessary: *Lowry v. Steele*, 27 Ind. 168; *Bryant v. Merchant's Bank of Ky.*, 8 Bush, 43. Any act or language of the indorser calculated to induce the holder not to give notice, or to put him off his guard, or any agreement to dispense with notice, will excuse notice to such indorser: *Sigerson v. Matthews*, 20 How. 496; *Leffingwell v. White*, 1 Am. Dec. 97; *Leonard v. Gary*, 10 Wend. 504; *Bryant v. Wilcox*, 49 Cal. 47; *Sheldon v. Horton*, 53 Barb. 23; *Barclay v. Weaver*, 19 Pa. St. 39. The indorser is liable without notice where there is no principal party legally liable on the note or bill; as where the agent signed his principal's name after his death: *Burrill v. Smith*, 7 Pick. 291; or where

the note is void as between the maker and the payee, on account of the illegality of the consideration, or other cause: *Copp v. McDugall*, 9 Mass. 1; *Turnbull v. Bowyer*, 40 N. Y. 456. The reason for this rule is thus given by Daniel in his work on Negotiable Instruments, vol. ii, p. 143: "But every indorser warrants the instrument to be valid and exactly what it seems to be; and whether he knows the contrary or not, it seems to us, that he is absolutely bound if his warranty fails, without demand or notice." Want of notice is excused where the holder, after using due diligence, is unable to find the person to whom presentment should be made, or to ascertain his place of residence or of business. As to what constitutes due diligence, see *Gilchrist v. Downell*, 53 Mo. 591; *Gawtry v. Doane*, 51 N. Y. 84; *Wheeler v. Field*, 6 Metc. 290; *Whitridge v. Rider*, 22 Md. 548; *Smith v. Fisher*, 24 Pa. St. 222. Where a fund sufficient to protect him is left with the indorser for the express purpose of taking up the note at its maturity, no notice is necessary as to him: *Ray v. Smith*, 17 Wallace, 411; *Bond v. Farnham*, 4 Am. Dec. 47, and note; and note to *Mead v. Small*, 11 Am. Dec. 67. For a further discussion of this subject, see the note to *Leffingwell v. White*, 1 Am. Dec. 99.

DURHAM v. ODDIE.

[1 MARTIN, N. S. 444.]

POWER OF SALE does not authorize the transfer of the property of the principal in payment of a debt.

APPEAL from the court of the first district.

Grymes, for the plaintiff.

Livingston, contra.

By Court, MATHEWS, J. This case differs so little from that of *Thuret v. Jenkins*, heretofore decided, as reported in 7 Mart. 318 [12 Am. Dec. 508], and the slight variance between the two being in favor of the present plaintiff, that unless we overturn the whole doctrine of the common law, or *leges non scriptæ*, of England, as recognized in the former case, judgment must be rendered for the appellant. The counsel for the appellee seems to have been so well convinced that his client must fail in his claim, provided the obstacles opposed to him by the principles established in the former case could not be removed, that he has directed his arguments principally against the legal correctness of the decision therein given, on the ground that the court mistook the common law as adopted in New York, being that which ought to have governed in that case, as well as in the present. On examining the authorities cited we find nothing in them tending to the establishment of rules different from those laid down in the books relied on by the parties in the case of *Thuret v. Jenkins*, except an apparent contradic-

tion or discrepancy between the two cases to which we are referred in the fourth and twelfth volumes of Massachusetts reports. It is very possible that this apparent repugnance between those cases might be reconciled; but we deem it to be no part of our duty to undertake the task. We do enough if we avoid contradiction, and decide according to law, or what we honestly believe to be law, all cases regularly brought before us for adjudication.

In relation to the extent and validity of the plaintiff's title to the ship, which forms the object of the present contest between the parties litigant, as it is exhibited by the evidence of the cause, we refer freely to the reasoning in the case cited from Martin's reports, which we still consider sound, and unshaken by the arguments and authorities now adduced. If any doubt or difficulty could remain after the uncontradicted assertion of Judge Parsons, that no difference existed in the United States between what they term in England the grand bill of sale, and the ordinary bill by which ships are transferred from one person to another; the evidence in the present case goes far in removing such difficulty; for Durham's vendor delivered to him the evidence of title by which he, the seller, held from Garnis, who, for anything that appears to the contrary, was the original owner of the vessel. Another point of view in which this case may be considered renders the plaintiff's claims much stronger than that of the claimant in the case above cited. The present defendant claims under an act of sale, executed by an attorney in fact, for the original proprietor. There is no proof of any person having been paid, and to supply this defect in the transfer of property, evidence is introduced to show that Oddie was, at the time of the pretended sale, a creditor of the owner for whom the attorney acted. The power of attorney shows that Smith, the agent, was authorized to sell three fourths of the ship. But the manner in which he appears to have disposed of the whole vessel appears rather to be a *dation en paiement* than a contract of sale. This species of contract, although it strongly resembles a sale, is not precisely the same thing; and we are of opinion that a simple power to sell will not authorize an agent to give the thing intended to be sold in payment of the debts of his constituent. The defendant, therefore, has shown no legal title to the vessel in dispute. The plaintiff, we think, has; and therefore, it is ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided and reversed, and that judgment be entered for the plaintiff with costs in both courts.

CLAY v. BYNUM.

[1 MARTIN, N. S. 608.]

INDORSEMENT, WHAT WILL AUTHORIZE.—A power of attorney to sign the principal's name in any transaction the agent may deem proper, does not empower the latter to indorse for the former.

APPEAL from the court of the sixth district. The opinion states the case.

Thomas, for the plaintiff.

Wilson, contra.

By Court, **MATHEWS, J.** In this case, the defendant is sued as indorser on a negotiable note, which appears to have been indorsed by his attorney in fact. He refuses payment, on the ground of the attorney having exceeded his power, and consequently the constituent is not bound by the act of the former. In the court below there was judgment for the plaintiff, from which the defendant appealed. The record contains evidence which seems to have been intended to show a ratification on the part of the appellant, subsequent to the indorsement by the act of his attorney. But, as it is believed that the appellee has failed to establish that fact, we have only to examine the cause in relation to the procuration under which the attorney acted. It is general for all purposes, and also contains clauses giving special authority to act in many cases, amongst which is that of signing the name of his constituent in any transaction in which he might deem it necessary and proper. This latter clause, if any can do it, is that which must give the power assumed by the agent in making the indorsement above stated.

A power conceived in general terms, or procuration *omnium bonorum*, does not authorize the attorney to contract debts for the principal, unless such as may be necessary for the conservation of the property in his charge. In no case can he stipulate so as to bind the latter to his injury, unless specially authorized to the act which may result in injury. He cannot bind the constituent as surety; can make no donation, etc. We are of opinion that the authority given to the attorney, in the present case, to sign the name of his principal, ought not to extend to contracts which, from their nature, create any new debt or obligation on the latter. It might possibly have reached the renewal of notes, in which he was already bound, but the one which forms the basis of the present action is not shown to be of that sort. Being of opinion that the attorney had not authority to bind

his constituent, by indorsing notes which would create an original obligation, we conclude that in the case now under consideration, the former has exceeded his authority, and that, consequently, the latter has not contracted through him any obligation by the indorsement.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be avoided, reversed and annulled; and it is further ordered, adjudged and decreed that judgment be given for the defendant and appellant, with costs in both courts.

GUIDRY v. GRIVOT.

[2 MARTIN, N. S. 12.]

A LEGATEE cannot avoid for fraud a contract which was binding on his testator.

A WIFE is entitled to have vacated a conveyance made by her husband, and by which she is defrauded.

DECLARATIONS OF A VENDOR, not made in the presence of the vendee, are competent to show the fraudulent intent of the former in making a conveyance to the latter.

APPEAL from the court of the third district. The opinion states the case.

Dumoulin, for the plaintiff.

Preston, contra.

By Court, PORTER, J. The plaintiff seeks to set aside a conveyance made to the defendant by her deceased husband, of a lot of ground in the town of Baton Rouge, on the allegation that the alienation was fraudulent, made with the intention to deprive her of the right which she had in her husband's succession, as legatee of all the property owned and possessed by him, and to defraud her of her portion of the acquests and gains made during marriage. The defendants pleaded the general issue, and that a *bona fide* consideration has been paid by him for the property. On the trial of the cause of the first instance, two bills of exceptions were taken to the opinion of the judge. Our ideas in regard to them will be better understood by first examining what are the rights of the plaintiff in the different characters in which she presents her claim. Some part of the difficulty which attended the investigation in the court below, we apprehend now, from not sufficiently attending to this circumstance.

The plaintiff sues as legatee of all the property of her husband, and as partner in the community of acquets and gains. The rights which the law has conferred on her in these several capacities are widely different. In that of legatee, she represents the ancestor—claims under and through him—and has no other means of avoiding the contract but those which he possessed. As he, therefore, could not have given parol evidence to show that the sale was simulated, she was properly refused permission to do so. But in virtue of her claim to the one half of the property acquired during marriage, she advances pretensions in herself, independently of and adverse to those of her husband, and consequently stands with the privileges which the law confers on third persons, to enable them to avoid conveyances by which they are defrauded. They, as it is well known, may give parol testimony to show that the instrument which they attack is null and void. Indeed, it is of necessity they should do so; for if creditors, and persons not parties to acts, were held bound to provide themselves with a counter-letter, it would be making the very fraud of which they complain the means of depriving them of all redress against it.

The testimony offered in the court below was, however, rejected on grounds particular to this case. The plaintiff offered a witness to prove acts and declarations of the vendor, that the deed of sale to the defendant was without consideration. This was objected to on the ground that what was done or said by the seller, out of the presence of the purchaser, could not be used against the latter; and in the decision we think the court erred. To set aside the conveyance, three things were necessary: Fraud on the part of the vendor; fraud on the part of the vendee, and an injury to the party complaining. The acts and declarations of the first are surely as good and as high evidence as any other that can be given to prove fraud in him. They are, of course, not sufficient to show the vendee acted from the same motive; for then, as it was justly said in argument, every purchaser would hold at the mercy of him from whom he bought. But it is not a good objection to the introduction of evidence, that it does not make out at once the whole of the case in support of which it is presented. The defect of the proof, when received, seems to have been mistaken here for the right to offer it.

The second bill of exceptions was taken to the charge of the judge to the jury, that the fourth article of the civil code, 346, governed this case. We deem it unnecessary to examine

whether that opinion is correct in relation to the plaintiff's claim as legatee, as we are satisfied it was not so in respect to the pretensions set up by her to avoid the conveyance, on the ground that the property described in it made a part of that which belonged to the community, and was acquired during marriage. An objection was made that if she sued in this capacity she had mistaken her remedy; and that she ought to have brought an action against herself, who, as legatee, represented the succession of her husband. We think the action well brought against the person who received the property. What effect, if any, the acceptance of the succession of the husband has on her right, is a question which can only be examined on the merits: *Curia Philippica*, lib. 2, cap. 13, No. 8.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that this case be remanded for a new trial; and that the judge be instructed not to reject parol evidence of the declaration of the vendor; and not to charge the jury that the fourth article of title 6, chapter 1, of the civil code, 846, governs this case. It is further ordered that the appellee pay the costs of this appeal.

WHEN DECLARATIONS OF VENDOR ARE EVIDENCE AGAINST HIS VENDOR.—Parker, C. J., in *Bridge v. Eggleston*, 7 Am. Dec. 209: "The conduct and declarations of the grantor respecting the estate conveyed, and tending to prove a fraudulent intention on his part before the conveyance, is proper evidence for the jury upon an inquiry into the validity of such conveyance, by a creditor or subsequent purchaser, who alleges it to be fraudulent." The court say, in *Carpenter v. Muren*, 42 Barb. 300: "For were it an absolute conveyance, to avoid it for fraud, a fraudulent intent must be shown on the part of the grantee as well as the grantor." The rule seems to be that the declarations of the vendor are evidence against the vendee when made by the vendor before he parts with his interest, and with knowledge on the part of the vendee: See, in support of this rule, *Hughes v. Monty*, 24 Iowa, 499; *Wright v. Brandis*, 1 Ind. 336; *Ruffing v. Tilton*, 12 Ind. 260; *Chapel v. Clapp*, 29 Iowa, 194; *Wadsworth v. Williams*, 100 Mass. 126; *Alexander v. Caldwell*, 55 Ala. 517; *Chadwick v. Fonner*, 69 N. Y. 404. In the last case, the court say: "The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession, unless they were true. * * * In some of the states of the Union and in England, the admissions of a prior owner of choses in action, and other personal property, characterizing or affecting his title, are also admitted in evidence upon the same principle against those subsequently taking title from him. But in this state, after some uncertainty as to the rule, it was finally settled in the case of *Paige v. Cagwin*, 7 Hill, 361, that such admissions in controversies about personal property are not admissible. But in controversies as to real estate the rule remains as above stated."

HYDE v. LOUISIANA STATE INS. CO.

[2 MARTIN, N. S. 410.]

INSURED PROPERTY, RIGHT TO ABANDON.—The assured may abandon the insured property, if it has been damaged to half its value.

IF THE DAMAGE IS LESS THAN ONE HALF the value of the property, the assured has no right to abandon without first calling on the insurer to make necessary repairs.

IF THE INJURY which the vessel has sustained be such that the unsound and decayed parts of the vessel cannot be used as before the accident, without repairs equal to half the value, the insured may abandon.

BUT IF REPAIRING THE INJURY, which has arisen from one of the perils insured against, will replace her in the same situation she was before, no matter how unsound, the insured cannot abandon.

APPEAL from the court of the first district. The opinion states the case.

Livermore, for the plaintiff.

Eustis, contra.

By Court, PORTER, J. This is an action on a policy of insurance, executed by the defendants on the steamboat Alabama, by which they insured her against the ordinary risk for the space of twelve months. The petitioners state that after making the insurance and before the expiration of the time therein mentioned, the boat proceeded on her voyage, and while so proceeding, by reason of excessive fogs, and through the perils of the river, ran foul of another steamboat, and was wholly lost, and has been ever since abandoned to the insurers, of all of which they have had notice and have thereby become liable to pay the sum insured, viz., six thousand dollars. The defendants in their answer, admit the execution of the policy but aver that the hull of the boat, at the time of the execution, was not sound or sea-worthy; that she was not lost by the perils and risk insured against, but by the fault and negligence of the master. On these issues the cause was, by consent, submitted to a special jury in the court below, who found a verdict for the plaintiff for the whole sum insured. The defendants appealed.

The two questions to which the argument of counsel has been principally directed, in this court, are the sea-worthiness of the boat at the time of insurance, and the right of the insured under the circumstances of the case to abandon. The first is one of fact alone, and a number of witnesses were heard in support of the allegations of each of the parties. We have perused their testimony with a great deal of care, and though we do

think that the weight of it is in favor of the appellants, yet we do not feel that it sufficiently preponderates on that side to authorize us to set aside a verdict which an intelligent jury has pronounced; more particularly when the evidence was so contradictory. This part of the case disposed of, we come to the other and more difficult part of it, namely, whether the injury which the boat received, was such as authorized the plaintiffs to abandon her. The general rule on this subject is, that the insured may abandon in all cases where the object insured has been damaged to the amount of one half its value, this being considered total loss in the sense in which these words are used in the law of insurance.

Before examining the evidence, it is necessary to consider a question raised by the counsel for the appellees. It has been contended by him that even supposing the damage done to the boat was not such as authorized an abandonment, the appellants cannot claim the benefit of the objection, because they did not offer at once to pay all the expenses necessary to put the vessel in the same situation in which she was previous to receiving the injury. We have looked into the authorities to which we were referred in argument, in support of this position, and some other that our own researches have since furnished us with. We find it laid down by Marshall and Parke, on the authority of Lord Mansfield, that if the voyage be lost, or not worth prosecuting, if the salvage be high, if further expense be necessary, if the insurer will not at all events undertake to pay that expense, the insured may abandon. Such general expressions afford great latitude for construction, and we accordingly find that those whose duty it has been to act on them and apply them, are by no means agreed as to their true import. Some thinking that where there is even a technical total loss, the assurer can discharge himself from accepting the abandonment, by engaging to pay all the expenses necessary to replace the ship in the same situation she was previous to the accident. This opinion is combated, and apparently on strong ground by others, who contend that the offer cannot defeat an indisputably vested right. Which of these opinions we should adopt, it is not incumbent on us at this time to say, neither do we find it necessary to enter into another question, on which the courts are not all of the same opinion: whether the refusal of the insurer to advance money to defray expenses, will in any case turn a partial loss into a total loss: 6 Mass. 284; *Baxter v. New England Insurance*

Co., 4 Am. Dec. 125; 2 Marsh. 562, in note 5; 1 Serg. & R. 509; 1 Conn. 807; Phil. Ins. 406.

We say we find it unnecessary to enter into these questions, because the facts in the instance now before us do not require us to do so; admitting that a demand and refusal to furnish money sufficient for the necessary repairs authorize the assured, in case of a partial loss, to abandon, no such demand or refusal has been proved here. The plaintiffs commenced by abandoning, and deprived the defendants of an opportunity of discharging themselves, by advancing the money, or becoming responsible for the expenses. If the loss were only partial at the time the abandonment was made, the insured had no right to resort to that step; and it would be a most extraordinary doctrine to hold that a subsequent failure of the insurer to do something inconsistent with the right set up by the insured, should be held to render an act valid which was not so at the time it was made. Independent of the reason of the thing, the right given in the authorities relied on, justifies this construction. The words are: "If the insurer will not undertake to pay the expenses, the insured may abandon." This language implies most clearly that the abandonment must follow, and cannot precede the refusal; because if the insurer did undertake to pay the expenses, the insured could not abandon. In the case before us, the alternative of making repairs, or taking the boat, was not presented to the defendants. The plaintiffs took on themselves to consider the loss as a total one, and their right must be now tested by a reference to the state of things which existed at the time they resorted to this measure.

With this explanation of our views of the law we proceed to an examination whether the injury sustained by the boat was equal in amount to the one half of her value. The great difficulty in arriving at a correct conclusion on the point arises from three different facts, which we find clearly established by the testimony: 1. That at the time she was abandoned, the cost of repairing would have been more than she was worth; 2. That the damage she sustained from running foul of the Natchez, did not amount to more than one thousand four hundred dollars; and, 3. That if the boat had met with no accident she might have run in the state she was for eighteen months. On these facts it is contended by the insurers that all they had to do was to repair the damage she actually sustained; and that if from any other cause she was not worth

repairing, the fault was in the boat, and they are not responsible for it. On the other side it is urged that the two facts of her being able to run eighteen months had she not met with this injury, and the amount it would have cost to repair her show conclusively that it was owing to the accident these repairs were necessary; and that the insured was deprived of the use of his boat for the space of time mentioned in the policy.

We apprehend the rule to be that in case an injury is received by an old and decayed vessel, which, independent of the accident, might have run for some time; if the repairs cannot be put on her in such a manner that the unsound part can be used as formerly, without an expense on both, equal to the one half of the value; or in other words, when the injury which the insurers are obliged to make good is the cause of the decayed parts requiring repairs, that then the injured may abandon. But if repairing the injury, which has arisen from one of the perils insured against, will replace her in the same situation she was in before, no matter how unsound all the parts may be, then the insured should not have this right; for all that they can ask is that the boat should be placed in *statu quo*. We can find no elementary writer by whom, nor adjudged case wherein, the principle just stated is laid down; but we think it the common sense of the matter, and that it approaches closely doing justice to both parties. A case arose in the state of New York, and was decided there, in which a different rule was recognized. The facts in that case appear to have been that the vessel at the time of sailing was stanch and sound, but that her bottom was worm-eaten. She was compelled to put into Kingston in a damaged state, where, in the opinion of those who made a survey of her, it would have cost more than her value to repair her; she was accordingly sold, and the assured abandoned to the underwriters. On the trial a question was made, whether the repairs rendered necessary on account of the vessel being worm-eaten should be included in the estimate of the expense of repairs by which the loss should be determined to be partial or total. The jury were told "that if in calculating the repairs they believed that any were necessary on account of injuries received from worms prior to the vessel's sailing, the expense of such repairs should not be included in the estimate." The supreme court held this direction wrong, and they said, "if the ship be injured, the repairs being rendered necessary by a peril insured against, they ought to be made without any other examination as to her antecedent state, ex-

cept to determine the fact of her being seaworthy. We adopt as a general rule that if the old injuries are not such as to render the vessel innavigable, no deduction is to be made on that account from the cost of repairs:" 2 Cai. 85.

The latest writer we have on insurance observes: "This case cannot mean that if a ship struck a rock and break some of her planks and timbers, the insurers are liable to pay not only for the repairs of such damage, but also for repairing or replacing other parts of the ship which may have been worn out or have decayed, either before or subsequent to the commencement of the risk:" Phil. Ins. 406. Whether the case means that or not, we cannot say; but if it does, we can say that we cannot accede to it. For if the underwriters be responsible for any defect that may exist in the ship, independent of those occasioned by the accident, then it would follow that if the insured had hauled the vessel up without any such accident, and discovered that she was decayed and rotten, they could have called on the insurers to repair the injury which time had produced upon her.

Now this appears to us not to be one of the risks insured against. There are some general expressions to be found in the books, which go to support the doctrine that it is sufficient if the vessel be seaworthy at the time of insurance: Parke, 288; Marsh. 165. And Parke states, after quoting some *dicta* of Lord Mansfield's: "That if it can be made to appear that the decay to which the loss is attributable, did not commence till a period subsequent to the insurance, as she was seaworthy at the time, the underwriters, it is presumed, will be liable:" Parke, 289. If by these remarks, the writer means that such is the law as between the shippers of goods on board the vessel and the insurers, the equity of it, at least, can be conceived; but if he is to be understood as laying down the rule as applicable to a case between the owner and the underwriter, the justice of it is by no means so apparent; for the injury does not proceed from any peril of the sea, but from inherent defect in the thing itself. And the law is still more doubtful, for no such risk is insured in the policy. In other parts of his work, however, this author seems to recognize the rule as we understand it: 288 and 306. Marshall states that it is a well established principle, on which all the writers agree, that if a ship become innavigable from age and rottenness, the insurers are not responsible; and in support of his assertion, he quotes Traga, Valin, Pothier and Casaregis: 1 Cond'y's Marshall, 156 and 157; Phil. Ins. 246, 251. We conclude, therefore, that the under-

writers are not obliged to make good the decayed and rotten parts of a vessel, unless the accident which happens within the peril insured against, is of such a nature as will not admit of repairs being placed on her, so that the decayed and rotten parts can be used as formerly.

It now only remains to apply these principles to this case. We have it proved to our satisfaction that the damage which the boat suffered in running foul of the Natchez, did not equal one half of the value insured. The contract of insurance being one of indemnity, the assured, in justice, should not recover more than the sum necessary to repair the injury which the accident occasioned. But in support of the demand for the whole amount mentioned in the policy, they rely on the circumstance that it would have required ten thousand dollars to put the vessel in proper repairs. This must necessarily mean, not such repairs as were rendered necessary by the accident, for it is in proof that fourteen hundred dollars would have paid for them, but such as resulted from the unsound and decayed state of the boat, and for these, as we have stated, the insurers are not responsible. There is no evidence that the injury done by the accident was the cause of the vessel being condemned; on the contrary, it is expressly stated that this condemnation was owing to her rottenness. And on the whole, we are satisfied that there was not that total loss resulting from any of the perils covered by the policy, which authorized the insured to abandon.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that this cause be remanded for a new trial, and that the appellees pay the costs of this appeal.

As to the right to abandon when the vessel cannot be repaired for half her value, see *Abbott v. Broome*, 2 Am. Dec. 187.

FORD'S CURATOR v. FORD.

[2 MARTIN, N. S. 574.]

CONFLICT OF LAWS.—The matrimonial rights of the wife will be regulated by the laws of that country into which at the time of the marriage she intended to remove, if such removal is afterwards made.

APPEAL from the court of the eighth district. The opinion states the case.

By Court, MARTIN, J. The plaintiff alleges that the defendant's late husband died in this state, wherein he was domiciliated; that she renounced the community, and the only child, the succession of the intestate, and he, the plaintiff, was appointed curator to the vacant estate; that the defendant detains from him sundry slaves, part of the estate, etc. The answer denies the plaintiff's capacity of curator, and his right to the slaves, if they were part of the estate; as they were not inventoried, it avers they are the defendant's property; that her late husband, an inhabitant of Louisiana, married her in the state of Mississippi; that the intention of the parties was to remove to and inhabit the former state, and to have their respective rights regulated by its laws; that before the celebration of the marriage, her intended husband conveyed the slaves to trustees for her benefit. The plaintiff had judgment, and the defendant appealed.

The plaintiff introduced his letter of curatorship, the renunciation of the defendant to the community, and the child's to the succession, and it was admitted that the intestate died at his residence, in Louisiana, leaving the defendant his widow, and a child; that the deceased and the defendant lived together, without any separation of property having been made till his death. The common law of England and statutes up to the declaration of independence are the rules of decision in the state of Mississippi, unless altered by local laws. It is admitted that the slaves named in the petition were in the intestate's possession from the time they were brought to Louisiana until his death, and he received the avails of their labor during the marriage. It is admitted that Cumming and Ramsay obtained a judgment for one thousand one hundred and eight dollars and forty-six cents, which is unsatisfied, and Hagan and Miller one for three hundred and seventy-three dollars and two cents, which is also unsatisfied. Two notes of the intestate were also proved. The defendant proved that the slaves were her property and in her possession, in the state of Mississippi, before her marriage with the intestate, having brought them there from the state of Alabama about one year before her marriage. They were not inventoried; the curator gave security for five thousand three hundred dollars only.

The intestate and defendant were married in the state of Mississippi, in 1818. At that time the intestate had hired three of her slaves and taken them to Louisiana, and the rest were in her possession or that of her trustees. The intended husband had at the time a furnished house and farm in the state of Louis-

iana, and had sent a wagon to remove his intended wife's property to Louisiana. She had no house, but lived with her brother, in the state of Mississippi, and hired her negroes out; she left the state of Mississippi for that of Louisiana the day after the marriage, and had previously expressed intention to reside permanently in Louisiana. The negroes came to Louisiana two or three days after the marriage. Before the marriage the intended husband executed a deed of settlement for the said negroes, who were conveyed to trustees for her benefit.

The only question of law arising in this case is, whether the matrimonial rights of the wife are to be regulated according to the laws of the place in which the marriage is contracted, or those of the intended domicile and residence of the spouses? The wife does not contract where she enters into matrimony, but where she, after the marriage, migrates or removes. *Mulier non agit ubi matrimonium contraxit, sed ubi ex matrimonio migravit, vel divertit agit.* Cujas, ad l. 65; *Exigere dotem*, 164. The place where marriage is contracted is not so much that where the ceremony is performed, as that where the parties expect to live and settle: 3 Dall. 374, 375, *in notis*. When the husband and wife have different domiciles, it is to the law of the husband's domicile that the parties ought to have presumed to have submitted, because the wife, who, by her marriage, follows the husband's domicile, is presumed to have had in view the law of that domicile, which, by the marriage, is to become hers: Pothier, Comm. No. 14. The general rule is to attend to the law of the husband's domicile rather than to that of the place in which the contract is entered into: Lebrun, Comm. No. 18. *Exigere dotem mulier debet illic, ubi maritus domicilium habuit non ubi instrumentum dotale conscriptum est:* ff. 5, 1, 65. When a contract is made in reference to another country where it is to be executed, it must be governed by the laws of the place where it is to have its effect: 2 Burr. 1078. Gregorio Lopez, however, in one of his notes on Partida 4, 11, 24; 1 Mor. & Car. 432, appears to understand the principle which forcibly results from these authorities, with some exceptions. We think, however, that it may safely be laid down as a principle, that the matrimonial rights of a wife, who, as in the present case, marries with the intention of an instant removal, for residence in another state, are to be regulated by the laws of her intended domicile, when no marriage contract is made, or one without any provision in this respect.

It is, however, contended that in the present case the parties had in view the laws of the state of Mississippi, in which the

marriage was celebrated; because a settlement deed was executed, with the view of preventing the ordinary rights of the husband from attaching. This settlement is evidence of a desire of the parties to preserve the wife's property and the slaves from the ordinary effect of the laws of the state of Mississippi. It is urged that this settlement is void, because the husband had no property in the slaves at the time of its execution; because there was no tradition; because it was not recorded in this state. We think that the settlement had the effect to prevent the husband from availing himself of any title he might afterwards acquire, to destroy that which he had thus attempted to confer: 12 Johns. 201; 1 Johns. Cas. 90. The negroes were in the possession of the wife, for whose benefit the settlement was made, and this possession was not disturbed; they came on from Mississippi to Louisiana after the marriage, and it does not appear the husband possessed, or interfered with them until after marriage, and his interference appears only that of a husband on the paraphernal property. The neglect to record does not affect the rights of the parties to the settlement, and creditors only can avail themselves of it. A curator of a vacant estate represents the heirs; they cannot set up the neglect to record.

We are of opinion that the husband never acquired any right to the slaves, and they never ceased to be the wife's or her trustees'; the plaintiff, therefore, is without interest to claim them.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that there be judgment for the defendant, with costs in both courts.

Murphy v. Murphy, 12 Am. Dec. 475, and note; note to *Medway v. Needham*, 8 Id. 133; *Le Breton v. Nouchet*, 5 Id. 736, and note.

CHESNEAU v. GIBOD.

[2 MARTIN, N. S. 612.]

GUARDIAN, CONVERSION BY.—A ward may elect to consider an illegal sale made by his guardian as a conversion of the property sold, and may recover the price with interest.

APPEAL from the court of the parish and city of New Orleans. The opinion states the case.

Seghers, for the plaintiff.

Masureau, *contra*.

By Court, MARTIN, J. The plaintiff states himself to be one of the three children and heirs of J. Chesneau and Susan, his wife, who, after the death of her said husband, married Godwin; that the defendant was his guardian, and during his minority, alienated a lot of ground in New Orleans, three slaves and a horse, part of his father's estate, by a transaction with Godwin, on the settlement of the alleged rights of the plaintiff's mother; that by a decision of the supreme court, *Chesneau's Heirs v. Sadler*, 10 Mart., the said transaction has been held null and void. He concluded with a prayer that he may recover from the defendant the interest of his share of the appraised value of the lot, from the date of the transaction until the judicial demand by the inception of the suit against Sadler; his share of the appraised value of the slaves and horses, with interest from the date of the transaction. There is further a prayer for general relief. The general issue was pleaded. The plaintiff had judgment, and the defendant appealed.

It is very clear that the defendant is not bound to pay interest on the plaintiff's share of the appraised value of the lot, for he did not receive the price of the lot, which the existing laws prohibited him from selling. If he received, or could have received, any money by the rent of the lot, he is accountable therefor; but the lot is alleged to be an unimproved one, and it is neither alleged nor shown that it was susceptible of being made to produce any rent. The plaintiff is at liberty to consider the alienation of the negroes and horses (as it appears to have been illegally done), as a conversion of them to the use of the defendant, who is bound to pay the value, and as guardian must pay interest thereon. This amounts, as stated in the petition, and proved by the inventory, to twelve hundred and eighty-four dollars and seventy-five cents, exclusive of interest.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff do recover the said sum of twelve hundred and eighty-four dollars and seventy-five cents, with costs in the parish court, reserving the defendant his claim against the plaintiff for so much of Godwin's claim due by the plaintiff, as may have been extinguished by the alienation of the slaves and horses, and it is ordered that plaintiff pay costs in this court.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

TOWLE v. MARRETT.

[3 GREENLEAF, 22.]

REPEAL OF STATUTE BY IMPLICATION.—An act of the legislature of Maine, relating to the same subject as a statute of Massachusetts, continued in force by the act of separation, but expressing different sentiments, establishing different principles, and containing provisions better suited to the people of Maine, is a virtual repeal of the act of Massachusetts.

ERROR to reverse a judgment of the common pleas. The question raised was, whether a physician might now maintain assumpsit for his fees, without having deposited a copy of his license with the town clerk of the town wherein he resided, agreeably to Stat. 1817, ch. 131. The statute of 1817, ch. 131, required that after July 1, 1818, persons commencing the practice of medicine must first be licensed by some medical college; and section 3 of this act enacted that any person who might be thereafter licensed to practice physic should deposit a copy of his license with the clerk of the town where he might come to reside, on pain of being debarred the benefit of law to recover his fees. By the act of 1818, ch. 113, persons commencing practice after July 1, 1819, were required to be first licensed by the Massachusetts medical society, or to receive the degree of doctor of medicine from Harvard university. The Massachusetts medical society appointed five examining directors for each of the five districts into which the state was divided, and of which districts Maine was one.

By statute of 1819, ch. 161, separating Maine from Massachusetts, all the laws which should be in force in Maine on the fifteenth of March, 1820, were to remain in force; "such parts only excepted as may be inconsistent with the situation and

condition of said new state, or repugnant to the constitution thereof." The medical society of Maine was established by the act of 1821, empowered to license all who should pass an examination, such examination not to be refused to any candidate under penalty of a sum, not exceeding one hundred dollars, to his use. And by the statute of 1821, ch. 180, all the laws of Massachusetts which had been re-enacted were repealed, so far as Maine was concerned, but the repealing act setting forth the titles of the acts repealed, did not enumerate the above mentioned statutes.

The plaintiff in error, the plaintiff below, was licensed by the New Hampshire medical society, in September, 1819; he soon afterwards came to reside in this state, but did not deposit his license with the town clerk. The services sued for were performed in 1822.

Fessenden and Deblois, for the plaintiff in error.

Greenleaf, *contra*.

By Court, Mellen, C. J. The statute of 1817, ch. 181, denies the right of action to no surgeon or physician, if licensed by any medical society. The statute of 1818, ch. 118, denies such right to all not licensed by the Massachusetts medical society, or honored with the degree of doctor of medicine from Harvard university; and repeals the provisions on this subject in the former act, but does not in terms repeal the third section of it, which requires a copy of the diploma to be recorded in the office of the clerk of the town in which such surgeon or physician shall reside. The latter act went into operation from and after July 1, 1819. The plaintiff's diploma bears date September, 1819, and therefore it gave him no right to practice as a physician or surgeon in any part of Massachusetts, and enjoy the benefit of legal process to recover his fees or compensation for his services. Hence it follows that it is of no consequence whether the diploma, or a copy of it, was ever recorded in the office of the town clerk or not; nor whether the third section of the former statute is repealed or not; unless, if in force, it has relation to diplomas or letters testimonial granted by the Maine medical society, which will presently be considered. If the act of 1818, ch. 113, is now, or at the time the plaintiff's services were performed was, in force, then this action cannot be supported. It is not repealed by the general repealing act of 1821, ch. 180. If it remained in force after the fifteenth of March, 1820, it was in consequence of the pro-

visions in the sixth section of the act of separation. It is contended that it did not, and could not, after this state became independent; because one of the five medical districts, created by the third section of that act, was composed of those counties of Massachusetts which now form the state of Maine. This objection seems to admit of no satisfactory answer. But, supposing it did so remain in force after the fifteenth of March, 1820, was it in force when the plaintiff's services were performed in 1822, or at any time after March 8, 1821, when the Maine medical society was incorporated? In deciding this question, it is necessary to consider the reasons which occasioned the introduction of the before-mentioned provisions into the act of separation. It was evidently designed to prevent the confusion consequent upon a suspension of law, and the injury which would thereby result to the community and individuals. It was for the purpose of giving time to the legislature of this state to re-enact, modify, or repeal those laws, as, on consideration, they should determine most for the interest and best adapted to the situation of the state. Therefore, any act of our own legislature, relating to the same subject with a statute of Massachusetts continuing in force here by the act of separation, but expressive of sentiments different from those of the legislature of Massachusetts, establishing different principles and containing provisions deemed better suited to our habits, views and situation, ought to be considered as a virtual repeal of such act of Massachusetts; and such an alteration or repeal was intended in the saving clause in the act of separation alluded to.

In this manner, and on these principles, we must construe the act establishing the Maine medical society. It was evidently intended to regulate and improve the practice of physic and surgery in this state; and with this view to establish certain principles and rules to be observed in medical education, as preliminaries to the obtaining of the letters testimonial of the society, or a degree of bachelor or doctor of medicine in Bowdoin college. In short, it was designed to supersede all the legislative provisions which had been enacted in Massachusetts on the subject, and to place it on ground of our own. All its provisions lead to this conclusion. It contains no clause requiring a copy of the letters testimonial to be recorded in the town clerk's office, nor does it attach any legal disabilities to a practitioner who has never obtained a license, or never recorded it, if obtained, in the manner required by the two acts of Mas-

sachusetts. This being a distinct and full expression of the public mind on this interesting subject, we are bound to consider all the pre-existing laws and regulations in relation to it as superseded, and at an end. Hence, the position of the defendant's counsel, that the third section of the statute of 1817, ch. 131, is now in force in this state, and that the letters testimonial granted by our own medical society must be recorded in the town clerk's office, to entitle the licentiate to the benefit of legal process for the recovery of compensation for his professional services, cannot be admitted to have any foundation. The whole spirit of the act incorporating our own medical society forbids us to admit the principle contended for. Besides, the very terms of the third section relied on, do not embrace the present case. It speaks only of those licensed to practice in the commonwealth of Massachusetts; and the meaning must have been, licensed by some of the authorities described in that act, or the subsequent statute of 1818, ch. 113.

For these reasons, we are satisfied that the judgment is erroneous, and must be reversed; and a new trial may be had at the bar of this court.

REPEAL OF STATUTES BY IMPLICATION.—The repeal of an early statute by a later one, wherein are no words of repeal of former acts, rests in the presumption that the legislative body intended to give effect to its enactments. Where the legislators have considered the subject-matter of a prior statute, and have adopted other acts embracing that subject-matter, and have made such changes as renders it impossible for both statutes to be in force, it follows, as a presumption of intention, in the absence of express declarations, that the second should take the place of the first. On the other hand, if the two enactments may subsist together, and each have operation, it will be presumed that the legislators had this possibility in mind where they have added to the subsequent act no words of repeal, and that they intended both statutes should stand.

As a result of this doctrine of intention, the repeal of statutes, by implication, is not favored by the courts: *People v. Quigg*, 59 N. Y. 83, 88; *People v. Palmer*, 52 Id. 82; *Hogan v. Guigon*, 29 Gratt. 709; *State v. Severance*, 55 Mo. 378; *W. W. Co. v. Burkhart*, 41 Ind. 364. And it is held such construction should be given the two provisions of the law as will enable them both to have effect: *Fowler v. Perkins*, 77 Ill. 271; *Iverson v. State*, 52 Ala. 170. Yet where the two statutes are plainly inconsistent, and cannot be reconciled by any judicial construction, the later act must be presumed to have been intended to take the place of, and repeal, the earlier one, so far as they are inconsistent. "A subsequent statute which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms; and even if the subsequent statute be not repugnant in all its provisions to a prior one—yet, if the latter statute was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act: Sedg. on Stat. and Const. Law, 124; *Rochester v. Barnes*, 26

Barb. 657, and cases cited. A subsequent statute making a different provision on the same subject is not to be construed as an explanatory act, but an implied repeal of the former: *Dash v. Van Kleeck*, 7 Johns. 477; *Columbian Mfg. Co. v. Vanderpoel*, 4 Cow. 556. Inconsistent provisions incompatible with each other are thus repealed, leaving the former law in full force and effect in all other respects: *Livingston v. Harris*, 11 Wend. 329; *Harrington v. Trustees of Rochester*, 10 Id. 547; *Excelsior Petroleum Co. v. Embury*, 67 Barb. 264. Generally, where there is a plain and unavoidable repugnance between the new provision and a former statute, a repeal by implication will take place: *Forqueron v. Donally*, 7 W. Va. 114; *Covington v. City of East St. Louis*, 78 Ill. 518; *Pacific R. R. Co. v. Cass County*, 53 Mo. 17; *W. W. Co. v. Burkhart*, 41 Ind. 364; *People v. Burt*, 43 Cal. 561; *Grant Co. v. Sels*, 5 Or. 243; *Hurst v. Hawn*, Id. 275.

As a rule, universally recognized, a new statute, revising the whole subject-matter of an old one, and evidently intended as a substitute for it, although there is no clause to that effect, will operate as a repeal of the old law: *State v. Rogers*, 10 Nev. 319; *Norris v. Crocker*, 13 How. 429. Followed in *United States v. Tynen*, 11 Wall. 95; *United States v. Barr*, 4 Saw. 256; *Dowdell v. The State*, 58 Ind. 333; *Hayes v. The State*, 55 Id. 99; *Longlois v. Longlois*, 48 Ind. 60.

The supreme court of the United States had occasion in *Murdock v. City of Memphis*, 20 Wall. 590, to pass upon the effect of the second section of the act of February 5, 1867, upon the twenty-fifth section of the judiciary act of 1789. In applying the principles of repeals by implication, Mr. Justice Miller, delivering the opinion of the court, said: "The act of 1867 has no repealing clause, nor any express words of repeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning; and the omission in the latter of two important provisions found in the former. It will be perceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion. A careful comparison of these two sections can leave no doubt that it was the intention of congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform: *U. S. v. Tynen*, 11 Wall. 88; *Henderson Tobacco*, Id. 652; *Bartlett v. King*, 12 Mass. 537 [7 Am. Dec. 99]; *Cincinnati v. Cody*, 10 Pick. 36; Sedg. on Stat. 128."

POTTER v. MAYO.

[3 GREENLEAF, 24.]

ATTORNEY'S LIEN.—An attorney had, at common law, no lien for his costs. In this state the attorney has a lien, but it does not exist until judgment. Hence, if the plaintiff assign his interest in the judgment before it is entered, the assignee holds free from the attorney's lien.

DEBT on an administration bond. The action was prosecuted in behalf of the attorney of one Martin in an action by Martin against Mayo, wherein the plaintiff recovered judgment. It appeared that the case, *Martin v. Mayo*, was taken under consideration by the court, and judgment pronounced early in the May term of 1813, but not entered until May 29. On the day after the rendition Martin assigned the judgment to one Curry, whom Mayo paid, and from whom he obtained a discharge. It also appeared that on the twenty-eighth of May, Mayo had notice of the assignment, but nevertheless paid the amount of the judgment to Curry. The present action sought to enforce the attorney's lien, on the ground that Mayo paid Curry with notice of the existence of the lien. The cause was submitted on the question whether, if the actual entry of judgment were necessary to perfect the lien of the attorney, any notice after that time could, by relation, avail the plaintiff to maintain the issue on his part. Verdict for the defendant, subject to the opinion of the court.

Emory, for the plaintiff.

Hopkins, *contra*.

By Court, **MELLEN**, C. J. In the course of the pleadings, the parties have lost sight of the assignment of McLellan, and issue is taken on the single question whether Mayo had notice of the attorney's lien before payment was made to Curry, on the twenty-eighth of May, 1813. The judgment in the suit of *Martin v. Mayo* was entered May 29. The inquiry then is, whether the lien existed or became perfect till judgment, so that notice of it could be given before that time, as alleged in the surrejoinder.

In the case of *Getchel v. Clark*, 5 Mass. 309, the court, in giving their opinion, said that "before judgment, it is very clear that the plaintiff might settle the action and discharge the defendant without or against the consent of his attorney, who had no lien on the cause for his fees; that after judgment, if the plaintiff released the judgment to the defendant, the law

had provided no remedy for him but an action for his fees against his client." Whatever rules or principles may have been adopted in the English courts, it seems that at common law an attorney has no lien for his costs, as the court also decided in *Baker v. Cook*, 11 Mass. 236. That court considered, and so do we, that whatever lien he has is created by the act of Massachusetts of 1811, ch. 84, directing officers in the levy of executions, wherein the creditor in one is debtor in the other, to cause one execution to answer and satisfy the other, so far as the same will extend. The act contains this proviso: "That nothing in this act shall be construed to affect or discharge the lien which any attorney has or may have upon any judgments or executions for his fees and disbursements." The proviso also protects *bona fide* assignments of judgments, executions and causes of action. The same provision is re-enacted in this state in the fourth section of the statute of 1821, ch. 60. By the terms of the law, the lien which is created is upon the judgment and execution, and the provision just quoted is for the purpose of protecting that interest which an attorney has in such judgment or execution, on account of his fees and disbursements, and preventing the judgment-creditor from discharging such judgment or execution, or enforcing the collection of the amount due, to the prejudice of such attorney's right and lien. According to the language of the statute, then, it appears that an attorney's lien does not exist until judgment. The lien is upon that, and on the execution issued on such judgment. If we attend to the design and object of the provision, we shall arrive at the same conclusion. As we have above stated, the intention of the legislature was to protect the attorney's interest from the control of his client; it was to give to him the security of the judgment-debtor, in addition to the original responsibility of his client. Now, it is perfectly clear that until a judgment is rendered, such additional security cannot exist, because until then no coercive power is given to the creditor, and it was against this power that the statute provision was intended as a guard. For these reasons, we think, the lien of the attorney in the present case never had a legal existence till judgment, which was on the twenty-ninth day of May; of course, no legal notice of such lien could be given till after such judgment was rendered, and, therefore, it was too late to destroy the effect of the payment of the judgment by Mayo to Curry, on the day preceding, which payment is admitted by the pleadings. In this view of the subject, it would be contrary to

justice and fairness, as well as to legal principles of construction, to give to the judgment a retrospective operation relative to the attorney's lien; for by so doing, it would overreach a payment by the defendant Mayo honestly made, and without notice of the attorney's right to a person authorized to receive the money; and we should thereby compel the defendants, or Mayo, the principal, to pay the debt a second time.

Judgment on the verdict.

BREWER v. SMITH.

[3 GREENLEAF, 44.]

ATTACHMENT, PROPERTY SUBJECT TO.—One who is entitled for services rendered to receive ten thousand bricks out of a kiln, has not, prior to their delivery to him, any interest therein subject to attachment.

TRESPASS against a deputy sheriff for taking and carrying away ten thousand bricks from the plaintiff's kiln. Verdict for the plaintiff, whereupon the defendant excepted. The case appears from the opinion.

Adams, for the defendant.

Hopkins, *contra*.

By Court, **WESTON, J.** The validity of the defense in this case will depend upon the question whether Benjamin Thomes, at the time of the attachment of the bricks as his property, had therein a vested interest. The kiln originally belonged to the plaintiffs, who also furnished the wood to burn it. Thomes was to burn the bricks, for which service the plaintiffs agreed to deliver him ten thousand of the same bricks, after they should be burnt. Thomes performed the service; but it does not appear that the bricks have been delivered to him, as by the plaintiff's contract, they engaged to do; nor did they assent to the attachment, but forbade it. Until delivery, actual or constructive, the claim of Thomes rested in contract, for the breach of which his remedy was by action. There is no evidence in the case from which a constructive delivery can be inferred. The plaintiffs have done no act, except that of entering into the contract. It was not agreed that upon the performance of the service, Thomes was to take the bricks; but they were to be delivered to him by the plaintiffs.

If after the bricks were burnt, Thomes had demanded his ten thousand, and had been told by the plaintiffs to take them; or

if anything had been said or done by the plaintiffs expressive of their assent that he should take them; that might have been sufficient, in an article of this description, to have vested the property in Thomes, so as to have rendered it liable to be taken at the suit of his creditor. But nothing of this kind appears. We have examined the cases cited by the counsel for the defendant, and find them to have been cases of sale, supported by a diversity of proof as to delivery, actual or constructive. But this is not a case of sale; but of a contract to deliver, untended with the circumstances from which a delivery can be presumed. The exceptions to the opinion of the court below are overruled, and the judgment affirmed.

WOODBURY v. NORTHY.

[3 GREENLEAF, 85.]

AWARD WHEN FINAL.—An arbitrator, after making and publishing his award, has no authority to re-examine the cause and make another award without the consent of the parties.

ASSUMPSIT on an award, tried on the general issue in the court below, from which it came up on exceptions taken by the plaintiff to a nonsuit. The arbitrator was called as a witness, by the defendant, and against plaintiff's objection, was allowed to testify. The substance of his testimony and the facts of the case appear from the opinion.

Allen, for the plaintiff.

Stebbins, for the defendant.

By Court, **MELLEN**, C. J. In this as in other actions of assumpsit, the general issue is a denial of all the material facts stated in the declaration and renders it necessary for the plaintiff to prove them. On this issue then, the defendant may contest the fact of submission, of making the award, and of notice thereof prior to the commencement of the action; because all these facts are necessary to create an obligation on the part of the defendant to pay the plaintiff the sum awarded. Hence it was competent for the defendant to prove any fact tending to show that the arbitrator was not authorized to make the award in question, although the submission had been proved as alleged; and for this reason the objection to the testimony of the arbitrator cannot be sustained, at least so far as it related to the time when, and the circumstances in which, the award was

made. The question is, whether the arbitrator had any authority to make the award declared on, bearing date, April 7, 1823. It appears that pursuant to the submission bearing date January 12, 1822, the arbitrator made an award on the fourth of March, 1822, delivered it to the plaintiff's counsel, and addressed notice of it to the defendant, though there is no proof that it was ever received; that the arbitrator considered himself discharged of all further trust, and conversed with the plaintiff and his counsel freely on the subject; and as he thinks, expressed his opinion that the defendant was in the wrong.

It further appears that the plaintiff considered the arbitrator as having made his final award, because he commenced an action on the award of March 4, 1822, at the August term of the court of common pleas next following; and it was admitted by the parties during the argument, that for want of proof of notice to the defendant of the award thus made, the suit was discontinued. After all this the submission was handed back to the arbitrator in March, 1823, who, after having given notice to the parties, proceeded, in the absence of the defendant to re-examine the cause, and made the award on which this action is founded, and therein awarded eight dollars more to the plaintiff than the amount of the former award, being for costs of the second trial. On these facts, it is difficult to conceive what authority the arbitrator had to make any further decision respecting the questions submitted to him, after he had completed his first award, and delivered it to the plaintiff's counsel. No consent of parties had ever been given for the continuance and exercise of his authority after that time. The authorities on this subject appear to leave no room for doubt: Cro. Jac. 584; 4 East, 584; 6 Id. 309; 8 Id. 53, and Kyd on Awards, 118, 125. On this ground, without noticing any other objection, we are of opinion that the last award is void; and of course this action cannot be maintained.

The exceptions are overruled and the judgment of the court below is affirmed.

THE RULE THAT AN AWARD SHOULD BE FINAL means not that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined to a reasonable certainty: *Strong v. Strong*, 9 Cush. 560. To render an award final, it is necessary that it should be a complete and final disposition and determination of the matter submitted. "The very sweeping character and operation of this rule will become obvious upon a moment's reflection. Without stretching the phrase beyond its ordinary meaning, the requisition of finality may be made to include a large proportion of all the characteristics essential to a valid award. Thus,

an award which is not certain, is not final; for where there is doubt, there can be no finality. An award which is not consistent is not final. An award which does not dispose of all the matters which the arbitrators are under obligation to dispose of, or which, in other words, is not co-extensive with the submission, is evidently not final. An award which neglects to give directions which are indispensable to the fulfillment of its decision is not final." *Morse on Arbitration*, etc., 384. See further on this subject, *Jocelyn v. Donnel*, *post*, and note.

ALTERING FINAL AWARD.—Arbitrators exhaust their power when they make a final determination of the matters submitted to them. They have no power, after having made such an award to alter it; the authority conferred on them is at an end. Having exhausted their powers by one determination, they cannot change that determination without the consent of the parties, any more than they could have made a binding award without a submission: *Dale v. James*, 4 N. Y. 567; *Bayne v. Morris*, 1 Wall. 97; *Aldrich v. Jessiman*, 8 N. H. 516; *Bigelow v. Maynard*, 4 Cush. 317; *Smith v. Smith*, 28 Ill. 56; *Butler v. Boyles*, 10 Humph. 155; *Thompson v. Mitchell*, 35 Ma. 286; *Bodge v. Hall*, 59 Id. 228; *Goodell v. Raymond*, 27 Vt. 241, holding that the mere clerical omission of a word may be corrected after the award has been made, as in no way involving a reconsideration of the merits: *Patton v. Baird*, 7 Ired. Eq. 222; *Eaton v. Eaton*, 8 Id. 102.

WINTHROP v. CURTIS.

[3 GREENLEAF, 110.]

LOCATING GRANT ADJOINING RIVER.—A grant of lands, extending along a river, and embracing the space of fifteen miles on each side thereof, must be located so that the sides will be parallel to the river, and so as to include all land which can be found within fifteen miles of the river, measuring from any point, in any direction, not above or below the points of limitation; and the ends must be at right angles with the general course of the river.

WRET of right. The contest was in effect between the proprietors of the Kennebec purchase, demandants, and the Pejepscot proprietors, tenants, concerning the western limits of the Plymouth patent. This patent bore date January 16, 1629, and was a grant from the council of Plymouth to William Bradford and his associates, of "all that tract of land, or part of New England, in America aforesaid, within or between, and extendeth itself from the utmost limits of Cobbiseconte, alias Comaseconte, which adjoineth to the river Kennebec, alias Kennebikike, toward the western ocean, and a place called the falls, at Neguamkike, in America aforesaid, and the space of fifteen English miles on each side of the said river, called the Kennebec river, and all the said river called Kennebec, that lies within the said limits and bounds, eastward, westward, northward or

southward, last-above-mentioned, and all lands, grounds, soils, rivers, waters, fishings, situate, lying and being, arising, happening, or accruing in or within the said limits and bounds, or either of them," etc.

The nature of the contention in regard to the location of this patent, appears from the opinion. A verdict was taken for the demandant, subject to the opinion of the whole court, upon the construction of the grant.

Orr and B. Williams, for the demandant.

Longfellow, Greenleaf and Fessenden, for the tenant.

By Court, WESTON, J. The demandants in this action move for a new trial on account of a misdirection of the judge in a matter of law to the jury; by which they were instructed that "If they believed the demanded premises were within fifteen miles of Kennebec river, measuring in any direction, or on any point of compass from the river, they ought to find their verdict for the demandants." It appears, from the evidence reported by the judge, that the demanded premises are within fifteen miles of Kennebec river, measuring in one direction; but that they are not within fifteen miles of the river measuring upon a west-north-west course. It is conceded that the land of the proprietors of the Kennebec purchase extends fifteen miles from the river, on each side; and that the determination of this cause will depend upon the course upon which this distance of fifteen miles is to be measured. The counsel for the demandants contend that it is to be ascertained by measuring in any direction, from any part of the river within their limits. On the other hand, it is insisted that this distance is to be ascertained by measuring at all points, at right angles with the general course of the river, which, as the counsel for the tenant assume, would require an admeasurement upon a west-north-west course. And they insist that their position is supported by the true construction of the original title of the demandants; by their actual grants and locations; by their deeds of release to the Pejepscot proprietors, ascertaining a part of the southerly line of their claim; and by the adjustment made between them and the commonwealth of Massachusetts, by which their title was confirmed within certain limits.

We are met at the threshold of this controversy by a decision of the supreme judicial court of Massachusetts, in the case of the Pejepscot proprietors, under whom the present tenant claims, and Zadock Bishop, cited by the demandant's counsel,

but not to be found in the reports, which they contend determines the question in favor of the demandants. Upon examining the case cited as reported by the judge who presided at the trial, it appears that the tenant claimed under the proprietors of the Kennebec purchase; that the land in dispute would not be included within their claim, measuring the fifteen miles upon a west-north-west course; but that it was within fifteen miles of the river, measuring upon a course at right angles with the river, and probably meaning according to its direction at the place from which the admeasurement was made. The judge instructed the jury that the proprietors of the Kennebec purchase had a right to extend their grant fifteen miles from the river, to be measured on a course at right angles with the river in every part; and that if they believed that the land in dispute lay within fifteen miles of the river, measuring in any direction, they must find their verdict for the tenant, which they accordingly did. To this opinion and direction of the judge the demandants excepted, and moved for a new trial on account of a misdirection in a matter of law. This motion having been argued in the county of Kennebec, and having been continued *nisi*, the supreme judicial court at November term, 1819, in Middlesex, directed the clerk of the county of Kennebec to enter upon the docket of the preceding term of that county that the motion for a new trial was overruled, and ordered judgment to be rendered upon the verdict. From the record and proceedings in the case cited it would seem that the whole court sustained the opinion given by the judge to the jury; but the counsel for the tenant in this action having produced a letter from one of the judges of that court, stating that no general principle of construction was settled, or intended to be settled in that cause, I have deemed it suitable and proper to go into a full consideration of the general question raised between these parties.

It may tend to a more satisfactory elucidation of the question to consider: 1. Upon what principles the claim of the demandants ought to be settled, independent of any actual locations made or agreements entered into by them; and, 2. How far their rights may have been affected by such locations or agreements. The original grant from the council established at Plymouth, of the lands now claimed by the proprietors of the Kennebec purchase, after fixing the points in Kennebec river above and below, to and from which it was limited, extended it for "the space of fifteen English miles on each side of the said

river, commonly called the Kennebec river, and all the said river, called the Kennebec, that lies within the said limits and bounds eastward, westward, northward, and southward." The difficulty in ascertaining the extent of the grants on each side of the river, arises from the winding and serpentine course which rivers and streams are uniformly found to pursue. By measuring the fifteen miles at every point, at right angles with the general course of the river, upon the hypothesis contended for by the counsel for the tenant, the two side lines would very nearly correspond with the particular course of the river in all its parts, and the end lines would be at right angles with the general course, and parallel with each other.

The lines ascertained in this manner would embrace about the same quantity of land which the grantees would have been entitled to had the river proceeded in a straight line between the points to which their grant is limited; and if we assume that the distance between these points in a straight line is twenty miles, but that as the river runs it is twenty-five miles; this rule of construction requires that a given space projected from a meandering line of twenty-five miles would embrace no more land than would be included in the same space projected from a straight line of twenty miles. It is demonstrable, however, that if you pass the end of a line of the given space in length, along the meandering base, and without withdrawing it in any part therefrom, with the opposite end mark an exterior line, keeping the measuring line always upon an inclination which will give such exterior line its greatest extension; the land embraced will be much more than the same measuring line would include, extended in the same manner along the straight base. And from every point in the exterior line you would reach the winding base in the given distance, and from every point in the same base you would reach the exterior line in the given distance, in some one direction.

The position in favor of the tenant's mode of admeasurement, the force of which I have felt most strongly, is, that every rod in the given base, which is the river, should determine the location of the same space in each of the exterior lines; the only practicable way of doing which would seem to require his construction. But the land conveyed was to extend the space of fifteen miles on each side of the river, which is equivalent to saying that it is thus to be extended from the whole and every part of each side. If, therefore, extended from some points in the river, the line of fifteen miles would not include so much

land as if extended from other points; yet as all points are equally given, I can perceive nothing which would preclude the grantees from measuring from such points as would be most favorable to them. And upon a full consideration of the question submitted, I am of opinion that the terms of the grant are best satisfied by extending it so as to embrace all the land which can be found within fifteen miles of the river, measuring from any point, in any direction, not above or below the points of limitation.

With regard to the end lines of the grant or patent, it appears to me that they should be formed by an admeasurement at right angles with a straight line extended between the points within which the grant is limited; or in other words, at right angles with the general course of the river. For the grantees are entitled to no land above or below these points of limitation; and whether land be above or below these points, will depend on the direction in which they lie in relation to each other. The general construction before given is supported by the case of *Pejepscot proprietors against Bishop*; although, for the reasons before stated, I have not considered that case as decisive of the present. I have not been able to find, among the reported cases of Massachusetts, any one which has presented a question like that raised between the parties before us. In New York, the true location of grants of a determinate breadth, extending along a river or stream, has frequently been submitted to their judicial tribunals; and, in one instance, the courts were called on to determine the construction of a grant extended for a given distance around certain plains, and which was considered as presenting the same question in principle. In the case of *Jackson v. Lunt*, 2 Cai. 363, Staat's patent was under consideration; which was run up the Hudson as the river runs, from a certain point, two hundred chains; thence up into the woods, northwest twenty chains to the mountain; thence along said mountain, parallel with Hudson river, to a certain rivulet; thence down the rivulet to the place of beginning. Spencer, J., in delivering the opinion of the court, observed that in running a line parallel with a river, it is only requisite that the distance where that is to control should be such that the river in some one point is not further off than is required. In other words, the west line of Staat's patent, without reference to the mountain, if run parallel with the general course of the river, might in some place be at a greater distance than the twenty chains, and yet be correctly run.

In *Williams v. Jackson*, 5 Johns. 489, before the court for the correction of errors, the location of the Hoosack patent was in controversy, which extended for two miles on each side of the Hoosack creek. De Witt Clinton, senator, in delivering his opinion, in which a majority of the court concurred, states that "the mode now adopted by the state, and considered the only practical one in cases like the present, is to run the bounds so that every point in them shall be exactly the given distance from the point nearest it in the creek or river." The same rule prevailed in the location of the Catskill patent, 5 Johns. 440, which was to extend four English miles from five great plains of an irregular figure. It seems, therefore, that the construction upon which the demandants rely, and which appears to be the true one, is in conformity with that which prevails in New York.

It remains to consider whether the proprietors of the Kennebec purchase have done anything in their locations, or in their agreements with the owners of adjoining tracts, impairing their right to the full benefit of this construction. They have located their lots uniformly, it is said, upon a west-north-west and east-south-east course; which, it is contended, is at right angles with the general course of the river. As these lines would be parallel with their end lines, there was a manifest propriety and convenience in this location, and I can perceive nothing in it which can have any tendency to curtail their western boundary. Nor can I discover that their western line was limited or restricted by their deed of release, in 1758, to the Pejepscot proprietors. By that deed a part of their southern boundary was to run "a west-north-west course, until it meets with the westerly line of the Kennebec purchase, as it extended north and south, and which is fifteen miles from said Kennebec river." In legal construction, this line would run a west-north-west course to the westerly line of the Kennebec patent, as a monument, wherever that might be, whether exceeding or falling short of fifteen miles. And although that line is represented as being fifteen miles from the river, yet that representation would be true in fact, if it was found to be so, measuring in any direction.

The adjustment between the proprietors of the Kennebec purchase and the commonwealth of Massachusetts was a matter of compromise and compact, to which the Pejepscot proprietors, under whom the tenant claims, were neither parties nor privies. But if it were otherwise, and we were now called upon to settle

the demandant's claim upon the principles of that adjustment, I am not aware that the limits of the Kennebec purchase would be curtailed by it. By the release from the commonwealth, the westerly line of the Kennebec purchase, within the limits of their original patent, was to keep the distance of fifteen miles from the river, and that, upon a true construction, as we have seen, would not be done, if any point in that line approached nearer than fifteen miles to any point in the river.

Upon the whole, it appears to me that the demandants are entitled to judgment on the verdict; and I am authorized to say that Judge Preble concurs in the result of this opinion.

MELLEN, C. J.. having formerly been of counsel, did not sit in the cause.

CHADWICK v. WEBBER.

[3 GREENLEAF, 141.]

DELIVERY OF DEED.—Handing a deed to the grantee to be put into a trunk containing the joint papers of the grantor and grantee, they being partners, and the grantor keeping the key, is not a valid delivery.

DECLARATIONS OF THE ANCESTOR, under whom both parties claim, unaccompanied by any act, showing what disposition he had made or intended to make of his estate, are not evidence.

Writ of entry. The demandants claimed five ninths of certain lands under their ancestor, Charles Webber, of which estate, they allege, he died seised. The tenants claim under Jeremiah Webber, a son of Charles, by virtue of a deed of the lands alleged to have been given by Charles to Jeremiah. Charles and Jeremiah were partners in trade. In 1809, Charles went before a notary, in the absence of Jeremiah, and acknowledged his deed of the premises in question to Jeremiah, for the expressed consideration of four thousand dollars. Jeremiah had drawn up the deed. In 1814, certain other deeds were executed by Charles in the presence of the son and of witnesses; the deeds were all in the son's handwriting, and after they had been executed, they were wrapped in a piece of brown paper, and deposited by the son in a trunk where the partnership papers were kept, and to which the father alone had the key. These deeds and the deed of 1809 were found in the father's desk on his decease, and upon the wrapper was written: "Charles Webber's deed to his son; not to be opened till after his death."

Evidence was introduced of the declarations of the father that

he had given a deed of the demanded premises to Jeremiah, and that he had refused to sell a part thereof without his son's consent. The demandants adduced evidence to show that the deeds, at all times during the life-time of the grantor, had been under his control, and that they were not put on record until after his death.

The tenants offered to prove by the father's declarations at different times that he had disposed of his property by deed, and what provision he had made for the children by his first wife; that he intended Jeremiah should have the residue, and that the judge of probate should have nothing to do with his estate; all tending to show that he considered his estate as finally disposed of by the deeds produced. This evidence was rejected; and the question of delivery of the deed of 1809 to the son, submitted to the jury with the following instructions: That any declarations of the father tending to show the nature of his possession of the land which he occupied till his death, and whether he claimed the estate thus occupied in his own right, or as tenant to his son, were admissible; that the burden of proof was upon the tenants, who ought to satisfy the jury that the deeds were actually delivered by the grantor, in his life-time, to the grantee, or to some other person for his use, with intent to pass the estate therein described; that if this had been done, verdict should be for the tenants; but that if the jury believed, from all the testimony, that the deeds never were delivered by the grantor to the grantee with intent to pass the estate, but only for the purpose of depositing them in a place of safety, as the agent of the grantor, and that this purpose was clearly expressed and made known by the grantor to the grantee, at the time, that then verdict should be for the demandants. Verdict for the demandants. The question as to the admissibility of the evidence and the correctness of the instructions, were reserved for the consideration of the whole court.

B. Williams, for the tenants, cited, on the admissibility of the rejected evidence and the sufficiency of the delivery, *Bridge v. Eggleston*, 14 Mass. 245 [7 Am. Dec. 209]; *Verplank v. Sterry*, 12 Johns. 536 [7 Am. Dec. 348]; *Buggles v. Lawson*, 13 Id. 285 [7 Am. Dec. 375]; 5 Id. 412; *Bartlett v. Delprat*, 4 Mass. 702; *Clark v. Waite*, 12 Id. 439; *Wheelwright v. Wheelwright*, 2 Id. 447 [3 Am. Dec. 66]; *Hatch v. Hatch*, 9 Id. 307 [6 Am. Dec. 67]; *Ivatt v. Finch*, 1 Taunt. 141; 1 Phil. Ev. 209, 418, note a, 421.

Sprague, contra.

By Court, WESTON, J. By the general rule of law, hearsay evidence of a fact in controversy is not admissible. To this rule there are certain well established exceptions; as, in questions of pedigree, custom, certain entries or writings, which fall within the principle of hearsay evidence, of a party charging himself, or restraining his own right thereby; and declarations making part of the *res gestæ*. So proof of the declaration of tenants in possession, as to the nature of the occupancy, and under whom they hold when the seisin of the proprietor is in controversy, has been admitted; and generally declarations of persons not under oath, when received in evidence, are admitted as facts in themselves from which presumptions may arise for or against the facts in question. Upon an examination of the authorities, we do not find that the testimony rejected falls within any exception to the general rule, by which hearsay evidence is excluded. They were declarations of the ancestor, under whom both parties claim, unaccompanied by any act, of the disposition which he had made, or intended to make, of his estate.

The cases cited by the counsel for the tenants are all distinguishable from the case before us. *Verplank et al. v. Sterry et al.* [7 Am. Dec. 348], was a case in chancery, in which Arden, the party whose declarations were received in evidence, had given his answer under oath; and the declarations had a tendency to disprove that answer. *Ivat v. Finch*, cited from Taunton, related to a personal chattel, and does not accord with the opinion of Lord Ellenborough, who tried the cause. In *Bartlet v. Delprat*, 4 Mass. 702, and *Clarke v. Waite*, 12 Id. 439, evidence of the declaration of the party was rejected; nor is there to be found in these cases any dictum, warranting the admission of the testimony rejected in the trial of this cause. In *Bridge v. Eggleston*, 14 Mass. 245 [7 Am. Dec. 209], the deed under which the tenant claimed was impeached, on the ground of fraud. In the case cited from 5 Johns. 412, Spencer, J., says: "That the declarations of a party to a sale or transfer, going to destroy and take away the vested rights of another, cannot, *ex post facto*, have that consequence, nor be regarded as evidence against the vendee or assignee." But he does not state that such declarations would be evidence, if made before, or if made in affirmance of such sale or transfer. The declarations received in evidence in *Doe v. Roe*, 1 Johns. Cas. 402, were those of a tenant while in the possession and occupancy of the land in question, stating to whom the same belonged.

A delivery of a deed may be by acts, or by words, or by both. It may be delivered by the party who made it; or by any other person, by his appointment or authority precedent, or assent subsequent. It may be made either to the grantee, or to any other person authorized by him to receive it; or to a stranger for his use and benefit. But if a man throws a writing on a table, and the party takes it, this does not amount to a delivery, unless it be found to have been put there with intent to be delivered to the party: Com. Dig. Fait. (A. 4). And upon the same principle, if the maker of the deed avails himself of the hand of the party for whom it is made, merely to put the deed into a trunk, desk, or other place of deposit, within the control of the maker, and such purpose is indicated and made known at the time, there is no legal delivery; no act being done or declaration made expressive of an intention to deliver.

In *Wheelwright v. Wheelwright*, 2 Mass. 447 [3 Am. Dec. 66]; *Hatch v. Hatch*, 9 Id. 307 [6 Am. Dec. 67]; and *Ruggles v. Lawson*, 13 Johnson 285 [7 Am. Dec. 375], cited by the counsel for the tenants, the actual delivery of the deeds to a third person was proved; and whether originally delivered as deeds or escrows, they were under the peculiar circumstances of each of these cases, holden to be operative as deeds from the first delivery. But the deeds in question in the present case, were never delivered to, or deposited with, a third person; nor does it appear that during the life-time of the grantor, they were ever, by his consent, placed within the control of the grantee.

We are of opinion that the testimony rejected was not legally admissible, and that the jury were properly instructed at the trial. There must, therefore, be judgment on the verdict.

TUCKERMAN v. HARTWELL.

[3 GREENLEAF, 147.]

MEMORANDUM ON A NOTE.—A memorandum at the bottom of a note, or an addition to the acceptance of a bill, stating a particular place of payment, made with the assent of the holder, is a part of the contract.

IF THE NAME OF A PLACE is written at the bottom of a note or bill it is for the jury to decide when, by whom and for what purpose it was placed there.

ASSUMPSIT by the indorsers against the drawer of a bill of exchange of the following tenor:

"445. Sixty days from date and grace, pay to the order of

Messrs. Whittier and Tuckerman, four hundred and forty-five dollars, value received, and place the same to account of your ob't serv't, John T. Hartwell.

"Joseph T. Woods, esq., Augusta, May 16, 1816."

The acceptance was written across the face of the bill, in these words: "Accepted to pay in Boston. Joseph T. Woods;" after which the bill was indorsed to the plaintiffs. At the bottom of the bill and near the left hand corner, was a writing not plainly legible, but which the defendant's counsel read at the trial as the name of "A. F. Howe & Co.," and contended that it was part of the acceptance designating the place in Boston where the bill was to be presented for payment. The plaintiffs contended that these words were no part of the acceptance; that if the bill was in the city of Boston at maturity, and the acceptor was not there, it was dishonored, and the drawer, on due notice, holden to pay. The notice was proved. It was also proved that the bill was presented for payment at the counting-room of A. F. Howe & Co. on the nineteenth of July, 1816.

Verdict for the defendant, subject to the opinion of the court.

Sprague, for the plaintiffs.

R. Williams, *contra*.

By Court, Mellen, C. J. Though it does not appear expressly that the bill in question was in Boston on the eighteenth of July, 1816, yet as it was presented for payment at the counting-room of A. F. Howe & Co., on the nineteenth of that month, and, as no reliance has been placed on this circumstance, if by the terms of the acceptance it was payable in Boston generally, perhaps the action is maintainable; though there is not proof of any inquiry and search for the drawer, who, it is admitted, was at that time an inhabitant of Wiscasset, in this state. But we give no opinion on these points, because they have received but little attention from the counsel and also because we place our opinion on another ground.

The only questions then are: What is the legal character of the words "A. F. Howe & Co.," written at the bottom of the bill? For what purpose were they placed there; and what operation, according to law, do they have in regard to the acceptance and the rights of the parties? The answer to these questions is not unattended with difficulties. With a view of ascertaining the words themselves, as well as their import, design and use, the inquiry was submitted to the consideration

of the jury; and under the instructions they received from the presiding judge, they have found that they were placed on the bill by the acceptor, at the time of the acceptance; that they were intended to designate the place in Boston at which the bill should be presented for payment; that the plaintiff knew that such was the intention, and knew also the place thus designated as the place of payment. These facts, thus found, taken in connection with the circumstance of the bill having been indorsed after acceptance, furnish proof that the nature and qualification of the acceptance, whatever they may be, were known to the payees at the time of the indorsement. Thus it appears that all the parties to the bill have acted with full knowledge of the nature of the contracts they have made. One objection urged against the instructions of the judge is, that he ought not to have submitted the above-mentioned facts to the consideration of the jury, but should himself have decided the legal effect of the acceptance, and of the additional words at the bottom of the bill. The answer to this objection is, that some of those facts could not appear from inspection; such as the time when the words were placed there, the person who wrote them, and the purpose for which they were written. These facts were proper for the jury to settle; and as to their legal effect, the judge did decide. His instruction to them was, that if they should find those facts and also knowledge on the part of the plaintiff, to be as they actually did find them, that then, on legal principles, the plaintiffs were not entitled to recover. The finding of the jury amounts to this, that the words added at the bottom of the bill are a part of the acceptance, and, of course, have the same effect as though added immediately after the word "Boston," and the acceptance would then have stood thus: "Accepted to be paid in Boston at the store of A. F. Howe & Co."

In this view of the facts proved, and the instructions given, we perceive no error, provided the legal conclusions drawn by him were correct, as to the operation of the acceptance thus proved and understood. An examination of the English decisions on the subject of special and limited acceptances, and the nature and effect of a memorandum on a note or bill as to the place of payment shows, at one view, change, variance and confusion of opinions, not only as to the legal operation of these qualifications of the contract created by designation of place for payment of a bill or note, but as to the mode of declaring upon such bill or note. The cases can never be recon-

ciled, and we must either continue to go on in uncertainty in our endeavors to preserve uniformity of decision in the commercial world, as far as we are able, by similar fluctuation of opinion; or else extract the good sense and sound reason of these conflicting cases, and then govern ourselves by settled principles. There have been so many distinctions introduced, not to say in some instances, refinements, that the real and honest intentions of the contracting parties have in numerous instances been overlooked or disregarded. The principle of law seems to be well settled in England that when a particular place of payment is introduced into the body of a bill of exchange or note, and not by way of memorandum, whether the action be against the maker or indorser of a note, or the drawer or acceptor of a bill; the bill or note must be presented and demand made at such a place, in order to maintain the action: See *Wolcott v. Van Santvoord*, 17 Johns. 248, and the cases there cited, and the note by the reporter. But if the designation at the place of payment is intimated in a memorandum in the margin or at the bottom of a note; or if the acceptance of a bill is accompanied by words "payable at" a particular place, such memorandum or qualification is not considered as any part of the contract, as it regards the note or acceptance according to several English decisions, and according to several others, the contrary principle is established. In *Smith v. Delafontaine*, tried before Lord Mansfield in 1785; *Saunderson v. Judge*, 2 H. Bl. 509; *Lyon v. Sundies and Sheriff*, 1 Campb. 423; *Wild v. Rennard*, Id. 425; *Trapp v. Spearman*, 3 Esp. 57; *Nichols v. Bower*, 2 Campb. 498; *Price v. Mitchell*, 4 Id. 200, and *Fenton v. Gaundry*, 13 East, 459, such memorandum or qualification was holden to be no part of the contract. In *Parker v. Gordon*, 7 East, 385; *Ambrose v. Hopwood*, 2 Taunt. 60; *Calligan v. Aylett*, 3 Id. 397; *Gammon v. Schmoll*, 5 Id. 344, and Chit. (2d ed. 1807) 184, the contrary principle has been adhered to. If a bill of exchange be general, and the drawer accept it, payable at a particular place, thus limiting its generality, the holder is not bound to take such an acceptance; but Johnson, in the note above mentioned, says: "If a holder of a bill, who is not bound to receive a qualified acceptance of it, does think proper to receive an acceptance, restricting the payment to a particular place, is it not, as between him and the acceptor, as much a part of the contract as if it was inserted in the bill itself, or as much as in the case of a promissory note made payable at a particular place? There seems to be no foundation for the dis-

inction. The court of C. B. are more consistent when they put it on the ground that it is a qualification of the contract and a condition precedent, the performance of which must be alleged and shown to entitle the plaintiff to his action." There certainly is much sound sense in this reasoning of the reporter. Besides, when the acceptor thus designates the place of presentment and payment, the presumption is that he will place funds there for payment; and when the holder receives such a qualified acceptance, why should he not apply at the place appointed, where the funds are presumed and agreed to be placed? For the same reason that the holder of a town order is bound to present it to the town treasurer, before he can maintain action against the town, as we have decided in the case of *Varner v. Nobleborough*, 2 Greenl. 121.

The acceptance of a bill of exchange is an independent act; as much so as the drawing of the bill. The drawer may accept on his own terms, but the holder is not bound to receive such an acceptance, if varying from the bill; if, however, he does so accept it, why in reason and justice should he not be considered as agreeing to its terms and conditions. And when this restriction or qualification is in the form of a memorandum, and is by all parties considered as a qualification, why should it not be considered a part of the contract, and as binding on all parties assenting to the same, as if inserted in the body of the bill or note. To make a distinction seems to be to give as much importance to a shadow as a substance. Several of the cases before cited, seem to make a distinction between actions against the acceptor upon a qualified acceptance, and actions against a drawer or indorser; that in the former case the acceptance renders the acceptor universally liable, and absolutely so without any demand at the particular place named in the acceptance; while in the latter case an action cannot be maintained unless a demand or presentment has been made at the appointed place, because the liability of the drawer and indorser is always conditional. The line of distinction, however, is not drawn with clearness, and, therefore, we have not founded our opinion upon it, though there seems to be good reason for the distinction.

Considering the difference of opinion which has prevailed in the English courts, there is more room and more reason for our careful examination of principles, and the adoption of those for our guides which appear to be found in the most substantial justice and soundest good sense; those principles which sanc-

tion and give effect to legitimate contracts, in whatever form they are made, which are perfectly understood, and are not forbidden by any statutory regulations. But we consider the principles established in the case of *Jones v. Fales*, 4 Mass. 245, as strengthening the arguments we have used as to the construction and effect to be given to the qualifying language of the acceptance. The action was founded on a promissory note given by Clapp to Fales, whereby he promised to pay him, or order, six hundred and eighty dollars in sixty days. Near the bottom of the bill were, inclosed in brackets, the words [foreign bills]. The note was indorsed by Fales to Jones, and the suit was against Fales as indorser; and one question in the case was, whether the note was a cash note; and if not, whether it could support the plaintiff's declaration. In the decision of that cause two questions were settled, which are of importance in this. One was that the words "foreign bills" were explained by parol testimony, in order to ascertain whether they were a part of the original contract, or a distinct and collateral engagement not applicable to the note in the hands of an indorsee. And the court set aside the verdict for the very purpose of admitting parol explanatory evidence. This authority seems to remove all objections to the propriety of admitting parol evidence in the present case, and submitting the facts relative to the memorandum, and the circumstances under which it is made, and its import and intention to the consideration of the jury. Another point decided was the legal effect and operation of the words "foreign bills," when unexplained by any parol proof.

For the sake of clearness we quote the language of Parsons, C. J., in delivering the opinion of the court. He observes: "The next question is, whether these words, thus written and placed, are a part of the promisor's contract? There is no proof by whom the body of the note was written, or whether these questionable words were inserted before or after the signature, or by the promisor or promisee. I can therefore reason only from the face of the note. And it is a reasonable conclusion that they must all be taken to be the words of the maker of the note, written before it was delivered to the promisee, and not the words of the promisee assuring to the promisor any honorary or legal indulgence, either absolute or conditional. If they are the words of the promisor, they must be considered either as idle words, or as a part of the promise to which he gave his signature, or as a subsequent memorandum, explanatory of the manner in which the promise was to be performed.

I am not authorized to consider them as words without meaning, and I do not think it material whether they were a part of the original contract, or added in explanation, for when the promisee took the note with these words on it, he was subject to the explanation in the memorandum, if it was one, as much as he would be bound by these words, if they were a part of the promise." According to this decision, the words "A. F. Howe & Co." were written by the acceptor at the time of the acceptance, and the return of the bill to the payees would have rendered the memorandum explainable, had the present action been brought by them, and such explanation would have bound them; and for the same reason it was explainable in the hands of the plaintiffs as indorsers; and as, by the finding of the jury, knowledge is brought home to them, of course they are also bound by the memorandum, if it is considered as such, in the same manner as they would have been, if by the bill itself the drawer had been requested to pay its amount at the store of A. F. Howe & Co.

In a word, according to the case of *Jones v. Fales*, the words "A. F. Howe & Co." were a part of the contract of acceptance, and therefore binding even without explanation; and being by law explainable, and having been explained and proved to have been inserted for the very purpose of designating the place where the bill should be, not merely might be, presented; and this being known and understood by all concerned, all are bound by it. And as the bill was not in due season presented for payment at the place designated in the acceptance, the present action cannot be maintained.

But there is another point of view in which the cause may be considered. As the bill in question is general in its form, not specifying any particular place of payment, and as the restriction relative to the place of payment was inserted by the drawer in his acceptance, he had as much right to make the bill payable at a particular store in Boston, as in Boston generally. Now, in the body of the acceptance, Boston is made the place of payment, and in the memorandum at the bottom of the bill, the store of A. F. Howe & Co. is made the place; and as the jury have found that all was written at the same time, and for the purpose, and as this restricted acceptance was not objected to by the holders of the bill, nor the bill protested on that account, as it might have been, and as knowledge of all this was given to the plaintiffs, as the jury have found, all parties must be considered bound by it. But supposing that the payees and

the plaintiffs were never bound by it, and that they had a right to treat the restrictions, as to the place of payment, as nullities even without a protest, how would the cause stand then? If such were the case, it is clear that the bill should have been presented for payment, not in Boston, but at the house or counting-room of the drawee at Wiscasset, where he was well known to reside and do business; yet it was never presented there. Therefore, whether the plaintiff were bound or not bound by the restrictions in the acceptance, the presentment was ineffectual. On this latter ground, also, the plaintiffs must fail.

As the jury have found for the defendant, there must be a judgment on the verdict.

MEMORANDA UPON BILLS OR NOTES, either underwritten, placed on the margin, or indorsed thereon, contemporaneously with the execution of the instrument, and by the agreement of the parties, will form a part of their contract, and bind them the same as if introduced into the body of the instrument: *Fletcher v. Blodgett*, 16 Vt. 26; *Henry v. Coleman*, 5 Id. 403; *Johnson v. Heagan*, 23 Me. 329; *Jones v. Fales*, 4 Mass. 254; *Springfield Bank v. Merrick*, 14 Id. 322; *Barnard v. Cushing*, 4 Metc. 231; *Shaw v. First Meth. Soc. etc.* 8 Id. 223; *Benedict v. Cowden*, 49 N. Y. 396; *Dinsmore v. Duncan*, 57 Id. 579; *Wait v. Pomeroy*, 20 Mich. 425; *Effinger v. Richards*, 35 Miss. 540; *State v. Stratton*, 27 Iowa, 424. That it is not material whether the memorandum is written on the back or on the front of the instrument is expressly stated in *Dinsmore v. Duncan*, 57 N. Y. 579; *Blake v. Coleman*, 22 Wis. 416; *Henry v. Colman*, 5 Vt. 402. If the memorandum is written after the execution of the instrument, and with the consent of all the parties, it will control the operation and effect of such instrument; but if such memorandum be made by one of the parties without the consent of the other, and is not a mere "ear mark" for the purposes of identification, but alters its legal effect, it will vitiate and avoid the bill or note: *Woodworth v. Bank of America*, 10 Am. Dec. 239 and note. Where the memorandum is made by a stranger, without the knowledge and consent of either party, it will be a mere spoliation and be disregarded: Id.; 1 Daniel on Neg. Inst. 154.

THE ALTERATION OF A MEMORANDUM constituting a part of a note or bill, is governed by the same rules as the alteration of the body of the instrument, except in some instances where the memorandum has been so made as to permit of an alteration, or cutting off from the note or bill, without affecting the apparent regularity of the instrument. Cutting off or obliterating a material memorandum which had the effect to make a note written on demand payable on time: *Wheelock v. Freeman*, 13 Pick. 165; or which annexed a condition on the payment of the note: *Wait v. Pomeroy*, *supra*; or provided for delay of collection until a certain person should take it up, the maker having paid it: *Johnson v. Heagan*, 23 Me. 329; or which made the note payable out of the profits of a certain business: *Benedict v. Cowden*, 49 N. Y. 396, was held in each of the above quotations to have worked a material alteration. Other cases in which the same principle has been enforced are *Dinsmore v. Duncan*, 57 N. Y. 579; *Cochran v. Nebeker*, 48 Ind. 459; *Gerish v. Glines*, 56 N. H. 9; *Palmer v. Largent*, 5 Neb. 223.

The exception above referred to in regard to a memorandum so written on the margin of a bill or note, that it could be readily separated therefrom without mutilating the same, has been enforced in favor of *bona fide* holders without notice: *Zimmerman v. Rote*, 75 Pa. St. 188; *Phelan v. Moes*, 67 Id. 59. These cases are cited, and their doctrine explained in *Brown v. Reed*, 79 Id. 372, as follows: "We mean to adhere to those cases as founded both on reason and on authority, as settling a principle of the utmost importance in the law of negotiable securities. That principle is, that if the maker of a bill, note or check issues it in such a condition that it may easily be altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity. The maker ought surely not to be discharged from his obligation by reason or on account of his own negligence in executing and issuing a note that invited tampering with. These cases did not decide that the maker would be bound to a *bona fide* holder on a note fraudulently altered, however skillful that alteration might be, provided that he himself had used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skillful forgery of his handwriting. The principle to which I have adverted is well expressed in the opinion of the court in *Zimmerman v. Rote*, 75 Pa. St. 191: 'It is the duty of the maker of the note to guard, not only himself, but the public, against frauds and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them, with ease and without ready detection.'" This view is adopted by 2 Daniel on Neg. Inst., sec. 1407, and based on the maxim that where one of two innocent persons must suffer, the loss should fall on the one who has furnished the opportunity.

The decisions are, however, by no means uniform upon this question. In *Benedict v. Cowden*, 49 N. Y. 396, the memorandum under the maker's signature to a promissory note, in the words: "The above note to be paid from the profits of machines when sold," was deemed a material part of the contract between the parties. This memorandum was cut off by the payee, it seems, without the maker's consent, and indorsed to the plaintiffs, admitted to be *bona fide* holders for value. The court held the severance of the memorandum a material alteration of the note, which destroyed it even in the hands of the innocent indorsees, and cited *Johnson v. Keagan*, 23 Me. 329; *Nazro v. Fuller*, 24 Wend. 374; *Dewey v. Reed*, 40 Barb. 16; *Burchfield v. Moore*, E. & B. 683; *Simpson v. Stackhouse*, 9 Barr. 186; *Wheelock v. Freeman*, 13 Pick. 165; *Warrington v. Early*, 2 E. & B. 763. But the court say, *per Allen, J.*: "The question, whether the defendant, by his act, negligent or otherwise, enabled the payee to commit the forgery, and perpetrate a fraud upon an innocent purchaser of the note; and if so, as to the effect of such negligence, or any want of proper care upon his liability upon the note as altered by the severance of the memorandum, was not raised at the trial, and cannot, therefore, be made upon this appeal."

The case of *Dinsmore v. Duncan*, *supra*, involved the liability of the owner of a negotiable United States treasury note, whose negotiability had been destroyed by an indorsement made by the owner, in these words: "Pay the secretary of treasury for redemption." The note was sent by express to the secretary, stolen, the indorsement erased so that no evidence of it remained, and sold to bankers in the regular course of business. It was held that by the indorsement, the note, otherwise negotiable, was rendered non-negotiable; that the erasure of the indorsement was a mere spoliation, leaving the previous rights of the parties wholly unaffected; and that the original owner

was entitled to the note as against the *bona fide* purchasers. Although this decision was put upon the ground that the spoliation by a stranger did not affect the real nature of the instrument, the same result would have been reached under the doctrine of the Pennsylvania cases. There was no negligence on the part of the owner and indorser of the note; and the erasure was a fraudulent practice upon the owner, who had used ordinary care and precaution, and who, therefore, ought to be no more held than on a forgery of his handwriting. The element of negligence is also considered in *Harvey v. Smith*, 55 Ill. 224; and in *Seibel v. Vaughan*, 69 Id. 257, where memoranda, written in lead pencil, were erased, and the notes indorsed to innocent holders. There the indorsees were held entitled to recover, on the ground of the gross negligence of the party who made the memoranda.

In Michigan, the question whether the destruction of a memorandum, written under a promissory note and qualifying it, vitiates the note in the hands of a *bona fide* indorsee without notice, was directly raised and answered in the affirmative. The argument drawn from the negligence of the maker was urged upon the court, and disposed of as follows: "There seems, at first, a plausibility in the argument that a party signing a note with a separate memorandum, puts it in the power of the holder to gain easier credit for the note, than it would be likely to gain if altered in the body. But as it was well suggested on the argument, no one is bound to guard against every possibility of felony. And practically it is a matter of every day occurrence to feloniously alter negotiable paper as successfully by changes on the face as in any other way. The public are not very much more likely to be defrauded in one way than in another. There can never be absolute safety, except by looking to the character and responsibility of the persons from whom such paper is received, and who are always bound to respond for the consideration if it is forged: *Little v. Derby*, 7 Mich. 325. If a party makes a contract in such a manner as is authorized by law, he has a right to object to being bound to any other. A *bona fide* holder, before maturity, is allowed to receive the genuine contract, discharged from any equities attaching to the contract itself, as between the original parties, but he cannot get a contract where none was made:" *Wait v. Pomeroy*, 20 Mich. 428. On the authority of this decision, and of *Benedict v. Cowden*, *supra*, wherein the effect of negligence in charging the party in favor of a *bona fide* holder, was intentionally left untouched by the court, *Palmer v. Largent*, 5 Neb. 223, lays down the unqualified rule that the alteration or obliteration of a material memorandum avoids the note, even in the hands of innocent indorsees.

UPON THE SUBJECT OF ALTERATION of negotiable instruments generally, and the effect of filling blanks therein, see *Woodworth v. Bank of America*, 10 Am. Dec. 239, and the note thereto.

WILLIAMS v. GRAY.

[3 GREENLEAF, 207.]

WARRANTY, EFFECT OF.—A sale of land with warranty, operates to convey such title as the grantor may thereafter acquire.

A CONVEYANCE BY ONE CO-TENANT to another, for the purposes of partition, with a special covenant of warranty, will estop the grantor from asserting a title acquired subsequent to the conveyance and based on a tax sale made prior thereto.

WRIT of entry. The case appears from the opinion.

Orr, for the defendant.

Greenleaf, contra.

By Court, MULLEN, C. J. For some time prior to January 10, 1820, the parties in this suit were tenants in common, of the north half of the township in question; and on that day they came to a division; and Gray, by his deed of that date, sold and released all his right to the demanded premises (being part of said north half) to Williams; and Williams sold and released to Gray all his right to the residue of said north half. This deed from Gray is a good title against him, and, unless he has since that date acquired a title paramount to this, and of which he has a legal right to avail himself in this action, the demandant is entitled to recover. Whether he has acquired such a title is the question. The facts in the case are few and simple. A year before the division, viz., on the fourth of January, 1819, the whole of said township was sold, pursuant to law, by the sheriff of the county, for the payment of taxes which had been assessed thereon for the seven next preceding years. It was purchased by Hill and McLaughlin, for sixty-one dollars and ten cents, and the sheriff gave them a deed of it, reserving to the proprietors or owners the right of redeeming it within two years. On the thirteenth of March, 1820, Gray paid the purchasers sixty-nine dollars and eleven cents by way of redeeming the property sold, and they thereupon gave him a deed, whereby they sold and released to him all their right in said township. On these facts the tenant grounds his defense. From a view of them it appears that as the township had been sold a year before the execution of the division deeds, Gray and Williams, at the time of making those deeds, had no right or title remaining in them but the right of redemption, and the right of redeeming the demanded premises was conveyed to and vested in Williams by virtue of Gray's deed of January 10, 1820. What then was the effect of Gray's payment to Hill and McLaughlin, and of their deed to Gray? The answer to this question will settle this cause. It is not necessary in this cause to decide whether Hill and McLaughlin could, during the two years, sell the same land to a stranger, and thereby subject the original proprietors to the inconvenience and necessity of redeeming the lands of such stranger; the facts do not present this question. Whatever Gray did, was in the form of redeeming the lands; and the deed which he received of the purchasers, contains merely a release

of their right, without any reservation of a right of redemption, as would probably have been the case had the conveyance been made to a stranger. Nor need we decide the effect of such a deed. We place the decision of the cause on another ground.

It is a well settled principle of law that if A. sells with warranty to B. a piece of land to which he has no title; and afterwards purchases a good title, such title thus procured shall enure to the use and benefit of B.; because A. is estopped by his deed to B. to demand the land of him, or deny his own right to convey what he undertook to convey to him: Co. Lit. 47 b, and note 307; *Fairtille v. Gibbs*, 2 T. R. 171; *Jackson v. Metcalf*, 10 Johns. 91; *McCracken v. Wright*, 14 Id. 193; *Jackson, v. Stevens*, 16 Id. 110. And there are, also, several cases by which it is decided that although a deed contains no covenants of warranty, still the grantor shall never be permitted to aver that he had no title to the land at the time of conveyance, and thus to claim against his own deed, in consequence and in virtue of an after acquired title. To this point may be cited *Jackson v. Bull*, 1 Johns. Cas. 91, and *Jackson v. Murray*, 12 Johns. 201. These cases seem not to have been decided on the ground of estoppel technically considered. Perhaps, however, it is not necessary particularly to notice this distinction between the two classes of cases above mentioned, because the deed to Williams contains a special covenant of warranty on the part of Gray against all persons claiming from, by or under him, or his heirs. This covenant must surely be as binding on him in this action as it would be if his heir or assignee was the defendant, and the defense should succeed. According to the true intent and spirit of his covenant, it must be construed to extend as well to his own acts as to the claim of those claiming from, by or under him. Should the defense in this action prevail, it must prevail in consequence of Gray's own act in procuring the alleged title from Hill and McLaughlin. Against this act and claim, his covenant binds him; and, therefore, according to all the authorities, he is now estopped to claim the demanded premises against his own deed to the demandant. We see no principles on which the defense can be supported. In redeeming the lands, Gray must be considered as the agent of Williams, so far as his interest extended. And if Williams has not already reimbursed the moneys advanced by Gray for the purpose of redemption, he stands legally liable for the amount. For the present action is a ratification on the part of Williams of the act of Gray in redeeming the lands.

Let a default be entered, and judgment for the demandant.

FREEMAN v. PAUL.

[3 GREENLEAF, 260.]

AMENDMENT OF OFFICER'S RETURN.—An application for leave to amend a return is addressed to the discretion of the court, and may be denied if the granting of it will work an injustice.

MERGE OF MORTGAGE.—Whether the mortgage, on becoming vested in the same person with the equity of redemption, will merge or will continue as a charge, depends upon the intention actual or presumed of the person in whom the interests are united; and this person will be presumed to intend that which is most to his advantage.

BILL in equity to redeem a mortgaged estate. In May, 1814, Peter and Theodore Littlefield, tenants in common, mortgaged certain premises to Lunt and Paul, to secure the payment of four hundred dollars and interest in six months. In July, 1816, the equity of redemption was sold at sheriff's sale under an execution in favor of another creditor, and bought by one Emerson. In October, 1816, Lunt and Paul recovered judgment on their mortgage for possession of the premises, and in February, following, Lunt conveyed his half interest to Emerson. In July 1817, Emerson conveyed to the plaintiff one half of his interest acquired at the sheriff's sale. A *pluries habere facias* issued on the judgment obtained by the mortgagees, was delivered to the sheriff for service, July 13, 1818. The return was dated October 24, 1818, and running in the usual form, "By virtue of this precept I have delivered seisin and possession," etc., but no time of actual delivery was specified. In 1819 Emerson conveyed all his right, title and interest to Paul. This conveyance the plaintiff treated as an extinguishment of one half the mortgaged debt, and on the fifth day of October 1821, tendered to Paul, the sum of two hundred and ninety dollars for a redemption, which was refused.

Shepley, for the plaintiff.

Greenleaf, contra.

By Court, **MELLEN**, C. J. If the coroner's return speaks the truth, as to the time when seisin and possession were delivered to the mortgagees, then the tender was made in due season; being within the three years next following the date of the return. For the purpose of being relieved from the effect of the return, as it now stands, the counsel for the defendant has moved for leave to the officer who made it, to amend it by inserting July 13, 1818, as the day when seisin and possession

were in fact delivered; and he has introduced proof with a view of establishing the truth of his assertion. This motion is opposed by the plaintiff as not being grantable on principle. It is not necessary to notice the authorities introduced by his counsel to show the conclusiveness of the return. On the other side this seems admitted; and hence it is perceived the importance of the motion to amend it, inasmuch as it cannot be contradicted in its present form. In support of this motion the defendant's counsel has cited the case of *Thatcher v. Miller*, 11 Mass. 413. The report of the case there shows nothing decisive. The same case was again considered, and is reported in 13 Mass. 270. By this last report, it appears that the motion was denied; the court considering that it would be dangerous to grant it. But if we were clear that on principle it would be proper to grant the leave requested, another question remains, and that is, whether, in the circumstances of this case, justice requires that the amendment should be made. As a general principle, it is certainly true that when a mortgagee takes possession under his *habere facias* the owner of the equity of redemption has a right to consider the officer's return thereon as speaking the truth, and to make his calculations accordingly, with respect to redeeming. It may be, and often is, the only evidence which he has as to the time of taking possession. He will, in such case, rely on the record, presuming it cannot deceive him. It is said, however, that the general principle is not applicable to this case, because Freeman had personal knowledge that the *habere facias* was executed July 13, 1818. It is difficult to arrive at this conclusion from the depositions in the case. All the deponents, except Howard, the officer, say expressly, they do not know that Freeman had any knowledge of the service of the writ of possession; and Howard, himself, who doubtless has strong wishes on this subject, only says that Freeman had knowledge of the service of the writ, and was present at the time, which he says, he has no doubt was on the thirteenth of July; but he adds, that he is positive that Freeman wrote the return himself; and yet this very return bears date October 24, 1818. He says further, that Freeman wrote the return at his request. It must, therefore, be considered as written and dated according to Howard's direction; and thus contains a declaration on his part, that the return was completed, and was to take effect on that day, and not before; and, of course, Freeman was justified in so considering it; and from that day commenced his calculation of the three years, within

which he must redeem the premises. On these principles it would seem to be direct injustice to allow the amendment, as its operation would be retrospective, and destructive of the plaintiff's claims. But if we only place the present motion on the common ground of motions out of time, to plead infancy, or the statute of limitations, or the statute against usury, motions which are seldom granted, there would seem to be good reasons for denying the leave requested. This is a process in equity; and by refusing the motion and eventually sustaining the bill, we do no injustice to the defendant; his debt and interest must be paid, and perfect justice must be done him, before he will be compelled to surrender up the possession of the premises. But by granting the leave, the tender must be decided to have been too late, and the equity of redemption lost. As the motion is addressed to our discretion, we are at liberty to grant or refuse the amendment, according as the justice of the case may seem to demand. On the whole, considering all the circumstances above mentioned, our opinion is, that the motion ought not to prevail, and we deny it accordingly.

The counsel for the defendant has contended that as the return now stands, it does not follow necessarily that possession was not delivered on the thirteenth of July, 1818, because the officer, in his return, dated October 24, 1818, only says, "by virtue of this precept, I have delivered," etc., not saying when. We cannot admit this construction. The act must be considered as done on the day stated at the head of this return. It has also been urged that laying the return out of the case, there was an *entry en pais* on the thirteenth of July, and that such an entry was sufficient. On looking more carefully into the proof, it does not establish any such fact; it is mere opinion or hearsay. Besides, the answer of the defendant alleges nothing of this kind; it relies merely on the seisin and possession delivered by Howard, by virtue of a writ of *habere facias*. These circumstances, therefore, can have no effect in the decision of the cause.

The only question remaining to be considered is, whether a sufficient sum was tendered by the plaintiff to entitle him to maintain this bill; and under this head three points have been presented: 1. Was the equity of redemption capable of division so that the plaintiff could legally purchase a moiety of it? 2. If so, could he redeem the premises by paying or tendering a moiety only of the original debt and interest? 3. If so, has he tendered a moiety of such debt and interest? In consider-

ing these points, we shall change their order. As to the third, we would observe that a question arose at the hearing, whether the sum tendered was a moiety of the original debt and interest due at the time of the tender; to answer which question, it becomes necessary that an account of rents, profits and expenses, since the entry of the mortgagees should be taken. This has been done, and it is now ascertained that the sum tendered, added to the balance of rents and profits received by Paul, since possession under the judgment was taken, was sufficient; being more than a moiety of the original debt and interest. This disposes of the third point.

As to the first point, it is of importance to attend to dates. It appears by the deeds in the case that on February 22, 1817, Emerson was the owner of all the equity of redemption and of a moiety of the premises as mortgagee, or rather as assignee of one of the mortgagees. Now, if this union of titles in Emerson, as to a moiety, operated as an extinguishment of the mortgage in respect to such moiety, and a merger of the equity in the legal title, as is contended by the counsel, and will be examined by us under the second point, then it follows that when Emerson, on the twenty-sixth of July, 1817, conveyed to Freeman what he called one half of the equity of redemption, he, in fact, conveyed all the right that he had and that was then in existence. On this principle, the objection disappears, and leaves only one question or point more; being the second point before mentioned, viz.: Could the plaintiff redeem the premises and be entitled to a decree of restoration by tendering only a moiety of the debt and interest? This resolves itself into the question whether the union of titles in Emerson, of which we have before spoken, did, as to a moiety, extinguish the mortgage, and, of course, leave only one half the original debt and interest in legal existence. If so, the bill must be sustained and a decree passed in favor of the plaintiff; if not, it must be dismissed.

On this head we have examined the places referred to by the counsel for the plaintiff in Littleton and Coke, and the cases in the New York and Massachusetts reports. The former relate to extinguishment of rent as to all, or to a part, in certain cases; the latter refer to cases of extinguishment or suspension of debts by the appointment of the debtor as executor or administrator. The cases from 2 Ves. 264; 3 Id. 339; and 15 Id. 173, seem to establish or recognize the general principle that the union of the legal and equitable estates produce a merger

of the equitable, unless the contrary appears to have been the intention on the part of him in whom the two interests are united. In the case from 8 Johns. 168, cited by the defendant's counsel, there was express proof that the mortgage was kept on foot by way of security. But he principally relies on the case of *Forbes v. Moffatt*, 18 Ves. 385, as containing and establishing principles that will settle this cause in his favor. This case was also cited by the counsel for the plaintiff. The facts were: John Moffatt held a mortgage of certain estates to secure the payment of thirteen thousand pounds. Afterwards the mortgagor died, having by his will devised all his property, real and personal, to the said John Moffatt, the mortgagee; and the question was, whether the mortgage was extinguished or sunk in the devise. Sir William Grant, the master of the rolls, in delivering his opinion, lays down certain principles, regulating in all questions of such a nature. He observes: "It is very clear that a person becoming entitled to an estate subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot. The owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make is not whether he will take the estate or the charge; but whether taking the estate, he means the charge to sink in it or continue distinct from it." Whether no intention is expressed by words or actions on the part of the mortgagee, as to the manner in which he holds the estate after acquiring the whole title, recourse is to be had to presumptive intention. On this point the master of the rolls proceeds and says: "With regard to presumptive intention, it was evidently most advantageous for John Moffatt that this mortgage should be kept on foot; for otherwise, he would have given priority to the other mortgage, and all the debts of his brother (the mortgagor). The reasonable presumption, therefore, is that he would choose to keep the mortgage on foot. When no intention is expressed, or the party is incapable of expressing any, I apprehend the court considers what is most advantageous to him. Upon that principle, it was holden in the case of *Thomas v. Kemish*, that the charge should not sink; as that was for the advantage of the

infant." He further observes: "Upon looking into all the cases in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interests had united, whether the charge should or should not subsist; and in that case, I have already said it sinks."

In the above case of *Forbes v. Moffatt*, it was contended that as the whole estate was devised to John Moffatt, the mortgagee the whole charge or mortgage was sunk. In the case before us, as Paul purchased the equity of redemption as to a moiety only, it is not contended that more than a moiety of the mortgage is extinguished or charge sunk. Let us now apply the principles we have been considering to the facts in the case before us, and see if there are any circumstances showing an express intention on the part of Paul as to the continuance or merger of the moiety of the mortgage. We have none of his language or declarations on the subject; and the only acts on his part, in relation to the mortgage, are the recovery of judgment thereon in the year 1816, by him and Lunt, and receipt of seisin and possession in October, 1818, and both these events took place before Paul had acquired any interest whatever in the equity of redemption. This interest he purchased in May, 1819. Of course, neither of those acts can explain the intentions of Paul, in a transaction which did not occur till many months afterwards. As to Paul's refusal of the money tendered, accompanied by his reason for the refusal, it certainly does not furnish any evidence of intention as to the point under consideration. He claimed the property as his own absolutely, and denied all right on the part of Freeman. Such conduct is perfectly consistent with any good title in him, from whatever source derived. There being then no proof of intention by words or acts on the part of Paul, the next inquiry is whether the case furnishes any grounds of presumptive intention. The answer is simple and plain. No facts are disclosed showing that the continuance of the mortgage or charge, as to the moiety owned by Paul, has been, since he became the owner of it, or ever can be, of any advantage to him. We hear of no intermediate incumbrances whatever, and have no grounds presented to our view on which we can perceive any possible advantage in holding the moiety under the mortgage, when he owned the whole title and estate therein. In the language of Sir William Grant, we find nothing which shows that it was not, and is not,

perfectly indifferent to Paul, whether the charge should or should not subsist; and in that case it sinks.

The result is that there must be a decree for the plaintiff.

AMENDMENT OF OFFICER'S RETURN.—See *Malone v. Samuel*, 13 Am. Dec. 172, and note.

MERGER OF LEGAL AND EQUITABLE ESTATE.—See *James v. Morey*, post, and note.

FOSTER v. TUCKER.

[3 GREENLEAF, 456.]

MERGER OF CIVIL INJURY.—Where a felony is committed which includes a civil injury, the latter merges in the former.

STOLEN GOODS cannot be reclaimed by action; nor can trover be sustained therefor until after conviction of the thief. Assumpsit cannot be maintained even after conviction.

ASSUMPSIT for goods sold and delivered, and for money had and received. Pleas, the general issue, and the statute of limitations; reply, promise within six years. At the trial, the plaintiff proved that he had caused the defendants to be arrested and held in bail to answer for stealing his goods; that after the recognizance was given, Tucker asked plaintiff what he should give him to settle the matter, saying he could not pay him in money, but that he would pay in neat stock; and that the other defendant, in Tucker's absence, had said: "He and Tucker actually stole Foster's clothes; but that he should not have taken them if it had not been for Tucker." He also produced a copy of the indictment found against the defendants for stealing plaintiff's goods, being part of the goods now sued for.

By consent, the cause was submitted to the court on the question whether the evidence would sustain the action.

Wilson and S. Emery, for the plaintiff.

Orr and Greenleaf, contra.

By Court, *WESTON*, J. This is an action of assumpsit for goods sold and delivered. The defendants plead: 1. The general issue, which the plaintiffs join; 2. The statute of limitations. To the second plea, the plaintiff replies a new promise within six years, upon which issue is also joined. The case made by the plaintiff is, that in April, 1809, the goods

in question, being his property, were stolen by the defendants; and a new promise by each is attempted to be proved by certain declarations and admissions on their part. Upon the question whether these declarations and admissions are sufficient or not to take the case out of the statute of limitations, we give no opinion, as we are well satisfied that the plaintiff's action is not sustained by the facts agreed.

The action of assumpsit depends upon a promise, express or implied, arising from a sufficient consideration, where such consideration exists; if there be no express promise, the law will imply one, unless the circumstances of the transaction altogether exclude and negative such implication. Of this description is the case before us. The principle of law is, that where a felony is committed, which generally, and perhaps uniformly, includes a civil injury, the latter is merged in the public offense. The claims of the public are deemed paramount to those of individuals, who are not permitted even to reclaim their own property, known and identified, which has been taken possession of by the officers of justice, where a felony has been committed, unless restitution shall have been ordered by the competent authority, after the conviction of the offender, or where it may be done consistently with public interest. After conviction, however, the purposes of public justice being accomplished, the law permits the individual injured to vindicate his rights by an apt civil remedy. As the injury itself is founded in wrong, the remedy to be pursued must be one which is applicable to this class of injuries. It would ill accord with the symmetry or with the analogies of the law, and would be confounding well settled distinctions, to permit the party injured, at his election, to convert a transaction of this kind into a matter of contract. The modern principles of waiving the tort, and proceeding as upon a contract, has been sufficiently extended; and we are not disposed to apply it to new cases.

In Buller's *Nisi Prius*, 130, 131, the idea of maintaining assumpsit for goods stolen, is treated as an absurdity. He says that, in assumpsit for goods sold, if the evidence be that the defendant has agreed with the plaintiff's servant to pay him half price, which the servant is to have to his own use, this will not maintain the action; for here arises no contract to the plaintiff; he might as well bring assumpsit against one who steals his goods; and he cites Lord Holt as an authority. In another case, he states that in assumpsit for money received to the plaintiff,

iff's use, proof that a lamb of his was driven to London, and sold there by the defendant, will be sufficient, unless it appear to have been stolen, for then trover would be the only proper action.

It being the opinion of the court that the action cannot be supported in this form; according to the agreement of the parties, the plaintiff is to become nonsuit, and the defendants be allowed their costs.

MERGER OF CIVIL INJURY.—The doctrine, that all civil remedies in favor of a party injured by a felony, are, as it is said in the earlier authorities, merged in the higher offense against society and public justice, or, according to more recent cases, suspended until after the termination of a criminal prosecution against the offender, is the established rule of the common law. The source and history of this doctrine, and its adaptation to the system of jurisprudence in vogue in this country, were very ably and exhaustively considered by Judge Bigelow in *Boston etc. R. R. Co. v. Dana*, 1 Gray, 83, 97, from whose opinion the following extract is taken: "By the ancient common law, felony was punished by the death of the criminal and the forfeiture of all his lands and goods to the crown. Inasmuch as an action at law against a person whose body could not be taken in execution, and whose property and effects belonged to the king, would be a useless and fruitless remedy, it was held to be merged in the public offense. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except after a conviction of the offender, by a proceeding called an appeal of felony, which was long disused, and wholly abolished by 59 Geo. III., c. 46; or under 21 Hen. VIII., c. 11, by which the judges were empowered to grant writs of restitution, if the felon was convicted on the evidence of the party injured, or of others by his procurement: 2 Car. & P. 43, note. But these incidents of felony, if they ever existed in this state, were discontinued at a very early period in our colonial history. Forfeiture of lands or goods on conviction of crime, was rarely, if ever, exacted here; and in many cases, deemed in England to be felonies, and punishable with death, a much milder penalty was inflicted by our laws. Consequently the remedies, to which a party injured was entitled in cases of felony, were never introduced into our jurisprudence. No one has ever heard of an appeal of felony, or a writ of restitution, under Stat. 21 Hen. VIII., c. 11, in our courts. So far, therefore, as we know the origin of the rule, and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law.

"Without regard, however, to the causes which originated the doctrine, it has been urged with great force and by high authority that the rule now rests on public policy: 12 East, 413, 414; that the interests of society require, in order to secure the effectual prosecutions of offenders by persons injured, that they should not be permitted to redress their private wrongs until public justice has been first satisfied by the conviction of felons; that in this way a strong incentive is furnished to the individual to discharge a public duty by bringing his private interest in aid of its performance, which would be wholly lost, if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. This argument is doubtless

entitled to great weight in England, where the mode of prosecuting criminal offenses is very different from that adopted with us. It is there the especial duty of every one, against whose person or property a crime has been committed, to trace out the offender and prosecute him to conviction. In the discharge of this duty he is often compelled to employ counsel, procure an indictment to be drawn and laid before the grand jury, with the evidence in its support, and if a bill is found, to see that the case on the part of the prosecution is properly conducted before the jury of trials. All this is to be done by the prosecutor at his own cost, unless the court after the trial shall deem reimbursement reasonable: 1 Chit. Crim. Law, 9, 825. The whole system of the administration of criminal justice in England is thus made to depend very much upon the vigilance and efforts of private individuals. There is no public officer appointed by law in each county, as in this commonwealth, to act in behalf of the government in such cases, and take charge of the prosecution, trial and conviction of offenders against the laws. It is quite obvious that, to render such a system efficacious, it is essential to use means to secure the aid and co-operation of those injured by the commission of crimes, which are not requisite with us. It is to this cause that the rule in question, as well as many other legal enactments, designed to enforce upon individuals the duty of prosecuting offenses, owes its existence in England. But it is hardly possible under our laws that any grave offense of the class designated as felonies can escape detection and punishment. The officers of the law, whose province it is to prosecute criminals, require no assistance from persons injured, other than that which a sense of duty, unaided by private interest, would naturally prompt.

"On the other hand, in the absence of any reasons founded on public policy, requiring the recognition of the rule, the expediency of its adoption may well be doubted. If a party is compelled to await the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon. Nor can it contribute to the purity of the administration of justice, or tend to promote private morality, to suffer a party to set up and maintain in a court of law a defense founded solely upon his own criminal act. The right of every citizen under our constitution, to obtain justice promptly and without delay, requires that no one should be delayed in obtaining a remedy for a private injury, except in a case of the plainest public necessity. There being no such necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence.

"We are strengthened in this conclusion by the weight of American authority, and by the fact that in some of the states where the rule had been established by decisions of the courts, it has been abrogated by legislative enactments: *Pettingill v. Rideout*, 6 N. H. 454; *Cross v. Guthery*, 2 Root, 90; *Piscataqua Bank v. Turnley*, 1 Miles, 312; *Foster v. Commonwealth*, 8 W. & S. 77; *Patton v. Freeman*, Coxe, 113; *Hepburn's case*, 3 Bland, 114; *Allison v. Farmers' Bank of Virginia*, 6 Rand. 223; *White v. Fort*, 3 Hawks, 251; *Robinson v. Culp*, 1 Const. Rep. 231; *Story v. Hammond*, 4 Ohio, 376; *Ballew v. Alexander*, 6 Humph. 433; *Blossingame v. Graves*, 6 B. Mon. 38; Rev. St. of N. Y., part 3, c. 4, sec. 2; *Stata. of Me. of 1844*, c. 102."

This decision settled the law in Massachusetts, that the civil remedies in favor of a party injured by a felony, are neither merged in the higher offense against public justice, nor suspended until after the termination of a criminal prosecution against the offender: *Atwood v. Fisk*, 101 Mass. 363, 365. The

common law doctrine is repudiated also in the states represented by the following decisions: *Hawk v. Minnick*, 19 Ohio St. 462; *Hyatt v. Adams*, 16 Mich. 180; *Meister v. People*, 31 Id. 103; *Thayer v. Boyle*, 30 Me. 475; *State v. Pike*, 33 Id. 361; *Newell v. Cowan*, 30 Miss. 492; *Brunson v. Martin*, 17 Ark. 270. See 1 Bishop's Crim. Law, sec. 271 *et seq.*, where the adjudications in this country upon the subject in question are gathered and their various doctrines criticised.

MERRILL v. MERRILL.

[3 GREENLEAF, 463.]

RIGHTS OF INDORSEES.—Indorsees *bona fide* for value of negotiable securities, not overdue, are not affected by contracts and equities of which they had no notice.

ASSIGNEE'S RIGHTS.—The assignee of a non-negotiable chose in action holds it subject to all the equities which existed against it in the hands of the obligee.

WAIVER OF OFFSET.—Where the assignor of a note demanded payment and was referred to a co-promisor, and was not, until several years afterwards informed of any claim of offset; it was held that the right to offset had been waived.

ASSUMPSIT on a non-negotiable promissory note brought in the name of Humphrey Merrill against Andrew Merrill and Nathaniel Merrill, for the benefit of Uriah Holt, who claimed the amount as assignee of the note by delivery only, for a valuable consideration paid by him to the nominal plaintiff. The case came before the court on exceptions taken by the defendant to the ruling of the presiding judge below, that a certain account sought to be set off against the note, was allowable. The nature of this offset appears from the opinion. Verdict for the plaintiff for the full amount of the note.

Greenleaf, for the defendants.

L. Whitman, *contra*.

By Court, MELLER, C. J. On the twenty-sixth of April, 1819, the defendant signed the note declared on as surety for his son Andrew, for sixty-two dollars and sixty cents, payable in four years with interest annually. The note was not negotiable; but in August following was assigned by the plaintiff for a valuable consideration to Uriah Holt, for whose benefit the present action is prosecuted. About three years prior to the signing the note, the plaintiff was indebted to the defendant for a horse and a pair of steers, in the sum of seventy-six dollars on account; which circumstance was mentioned to the defendant when the note was signed, as a reason why he should not apprehend

danger or any serious loss, inasmuch as he could file his account in offset, should he be troubled or sued on the note. The account was duly filed against the note in this action; but as Holt had not been notified of its existence, until at or just before the trial, the court of common pleas rejected it, or in other words decided that it could not be allowed in offset against the note, and on exception to this decision the cause comes before us and the first question is whether the opinion is correct. The principle is well settled that negotiable securities, indorsed before they are overdue, are not liable to be impeached in the same manner as between the original parties, with a few exceptions, such as gaming and usurious notes, etc., which are declared void by the statute. In other cases the indorsee, who is such *bona fide*, is not affected by contracts, conditions or equities, of which he had no notice that existed between the promisor and promisee. The principle is founded on the importance of negotiable and negotiated securities in the commercial community. A different doctrine would essentially check their circulation and embarrass mercantile operations.

In *Peacock v. Rhodes*, 2 Doug. 632, Lord Mansfield lays down the principle in these words: "The holder of a bill of exchange or promissory note is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned subject to all the equity to which the original party was subject. If this rule be applied to bills and promissory notes, it would stop their currency." But the same law is not applicable to notes which are not negotiable, and to bonds, etc. As these cannot be legally indorsed or assigned, so as to enable the indorsee, or assignee more properly called, to maintain an action in his own name; the interest which in these cases is assigned is only an equitable interest. But this is now protected in courts of law as well as of equity, when assigned upon valuable consideration. In the case before us the counsel for the defendant does not deny that whatever equitable rights the assignee has ought to be protected; but he denies that he has any, because the plaintiff had none which he could assign to him. He contends that nothing more can be recovered for the benefit of Holt, the assignee, than could be rightfully recovered, provided there never had been any assignment; or in other words, that nothing can be recovered, because the amount of the offset is greater than the amount of the principal and interest of the note. In *Chute v. Robinson*, 2 Johns. 595, Kent, C. J., says: "There is no rule of equity better settled than that

a bond or other chose in action is liable to the same equity in the hands of the assignee, which existed against it in the hands of the obligee." In *Dunning v. Sayward*, 1 Greenl. 366, the court observed that "the law does not interpose and protect any but an equitable interest" in case of assignment. It seems to be plain that before the assignment of the note in question was made, the defendant had a legal right to offset his account against it, if then due, when sued; and it deserves consideration whether he can be deprived of that right without his consent. He may relinquish it expressly or by implication. The case does not find that he did it expressly; the debt filed in offset was expressly proved, and also the defendant's reliance upon it before the assignment, by way of indemnity, if called on for the note which he signed. The very protection of an equitable interest in an assignee presupposes danger and the need of protection; it presupposes a power in the assignor or debtor, or both, to defraud the assignee unless he is protected by courts of law. Now in cases where there is not any such legal power, legal protection is unnecessary, and the principle of law is inapplicable. Hence it would seem to follow that if in the present case the action could not be maintained if there had been no assignment, then the assignment cannot create a right of action and confer an equitable interest if the assignor had no interest of any description as against the defendant. In fact, this principle of which we are speaking requires no more nor less than this; that in case of an assignment the cause shall be tried and decided upon the facts as they existed at the time of the assignment; without regard to any acts of the assignor after such assignment, or any acts of the debtor injurious to the assignee after notice of it. The application of these rules, founded in justice and good faith, appears to show that the offset should have been admitted as a good defense against the action, if not waived.

The counsel for the plaintiff has relied, among other cases, upon that of *Jenkins v. Brewster*, 14 Mass. 291. The court have not given us the reason of their opinion, but in general language speak of the "peculiar circumstances of the case," as having deprived the defendant of the benefit of his offset. The opinion is certainly shorter than it is clear. The court, however, acknowledge the general right of offset of a debt existing prior to the assignment; but consider the facts of that case as taking it out of the general principle. They observe that, "after the assignment of the contract, and notice thereof

to the defendant, he could not, by any act of his, deprive the assignees of their rights under the assignment." Certainly not. The act they refer to must be the contract made with the plaintiff after the assignment, in virtue of which he relied on his offset. It was decided that it could not be allowed. The cases of *King v. Fowler et al.*, and *Fowler et al. v. King*, 16 Mass. 397, presented a question as to the right of offsetting the damages in one action against those in the other, where there had been an assignment; but on examination it appears that the question was decided upon the ground of waiver and acquiescence in the assignment. But the right of offset, in cases similar to the present, has been recognized and sanctioned by repeated decisions in Massachusetts and New York. The cases of *Hatch v. Green, admr.*, and *Green, admr., v. Hatch*, 12 Mass. 195, came before the court on a rule upon Green to show cause why his judgment should not be offset and deducted from Hatch's judgment against Green. It was opposed, on the ground that Green's judgment, or the debt for which it was recovered, had been assigned to J. & W. Smith, creditors of Green, and by them assigned to certain other creditors, for whose use the action was prosecuted. Parker C. J., in giving the opinion of the court, says: "The court would undoubtedly protect an assignee against a judgment obtained by the debtor upon a demand subsequent to notice of such assignment. But when the judgment claimed to be set off is founded upon a demand coeval with the one against which it is offered, equity would not require that an assignee should enforce the judgment against the rights and interest of the judgment-debtor. The assignee ought to be placed in as good a situation as the assignor would have been without the assignment, but no better. In an equitable point of view, where there are counter demands subsisting, liable to be set off against each other, one only is the debtor, viz., he against whom a balance would remain." In the above case the court directed the offset to be made. In *Mowry v. Todd*, 12 Mass. 281, the principle relied on in this case is clearly stated. Todd made a written promise to Fisher, who, by an unsigned and incomplete indorsement, transferred his interest in the contract and delivered the same to Mowry; and Todd afterwards expressly promised to pay the debt to him. On this ground the court sustained the action in Mowry's name. The chief justice proceeds: "With respect to the right of the defendant to set off any demand against Fisher, we think his engagement to pay the plaintiff effectually precludes him. When

notified of the assignment, if he had stated his counter-claims, and promised to pay only such balance as might be due, his debt would have been protected; or, if he had not promised at all, the action must have been brought by Fisher; and he would have had a right to set off according to the statute, if legally and equitably entitled; but his promise to pay amounts to a relinquishment of his right." In the case of *Jones v. Witter*, 13 Mass. 304, which was cited by the plaintiff's counsel, the principle is stated with equal clearness. The chief justice, in giving the opinion of the court, says: "The contract between assignor and assignee is operative between them only, until some act takes place which brings the maker of the note into the contract; this act is notice to him, and after such notice it becomes entirely immaterial to him which shall be his creditor, as all payments or lawful offsets, existing before such notice, will be allowed him."

The case of *Gould v. Chase*, 16 Johns. 226, in all its material facts is precisely similar to the one under consideration, with this exception, that in the former, Chase had distinctly acknowledged the rights of the assignee, and promised to pay him the debt. The court decided that the age of his offset, taken in connection with this express promise to the assignee, must be considered as a complete waiver of his right of offset. But everything in the case shows that had it not been for this promise and waiver, the offset ought to have been allowed. Neither the court or counsel intimated a doubt as to the general principle. This review of the cases in relation to the subject of assignments and offsets, we have deemed useful; and it will aid us in arriving at a proper conclusion in the decision of the cause. According to these, the defense should have been sustained, unless it has been lost on the principle of waiver. It does not appear on the report that the defendant ever promised Holt to pay him the note; or expressly admitted his rights as assignee; but there are some other circumstances in the case which deserve attention, and which have been relied upon to show a consciousness on the part of the defendant, that he had no claim on account against the plaintiff; and that the offset was at a late hour relied on as a defense. These we will notice presently. The account has been proved; and there is no direct evidence that it has ever been paid. The opinion of the court, to which the exception was alleged, was "That the said account in offset, though proved, could not be allowed against the note declared on, if the jury believed that said note was

assigned to said Holt before he had notice of the existence of the account." We apprehend that the authorities are clearly against this opinion, and uniformly so; and the question of *scienter*, on the part of the assignee, in respect to existing equities on the part of the debtor, is of no kind of importance; and the demand assigned must be taken subject to all such equities, known or not known. We apprehend also that the variance discoverable in the decisions on this subject arises from the circumstance of waiver of the right of offset, which in some of the cases was satisfactorily proved. In this case, each party has his equities; and we must impartially protect both; and in so doing we must inquire whether from all the facts before us, the legal inference is that the right of offset has been waived; if so, it would be useless and improper to send the cause to another trial, although the instructions of the judge to the jury on the point of notice, as we have already mentioned, were incorrect. We will now notice the facts in the case which are relied upon by the assignee as showing or amounting to a waiver of the right of offset; and showing also such an understanding and management between father and son as in legal contemplation amounts to collusion; and therefore entitled to no countenance in a court of justice. The horse and steers were sold in the fall of 1815 or 1816. The note in suit was signed in April, 1819. Humphrey was then in good circumstances, and able to pay the debt due on account of the horse and steers for a long time afterwards, but failed before the commencement of this action.

In May, 1820, Holt's agent called on the defendant, and informed him of the assignment, and requested payment of one note, and interest on this. The defendant replied that he could not pay the note; that as Andrew was under age, he signed the note to secure Humphrey; and that Andrew, when of age, would take up the note and clear said Nathaniel. The defendant did not claim to have any offset to the note, and said nothing about any account he had against Humphrey. And now what is the legal inference to be drawn from these uncontested facts? We are here presented with the declarations and the conduct of the defendant, in relation to the demand in suit; and it does not appear that from April, 1819, until the offset was filed in the clerk's office, after the action was commenced, any notice was taken of its existence. Is this conduct and are these declarations natural? Do people transact business in this manner? Are they in the habit of paying debts which they

do not owe, and when a balance is due them from those who are asking for payment? If the account for the horse and steers had not, in some way or other, been settled and satisfied before May, 1820, or if the defendant had relied upon it by way of offset, can it be believed that the defendant would not then have named his offset, given notice of it to Holt's agent, and claimed its allowance, instead of saying that he could not pay, but Andrew would, as soon as he was of age. This conduct may all be explained by the insolvency of Humphrey. After his failure the defendant could obtain no reimbursement of what he might be compelled to pay for him as his surety; and then to avoid such an eventual loss, and thereby at once to relieve himself even from liability, he set up his old claim on the account in bar of this action. The facts naturally lead the mind to this conclusion, and such a conclusion is fatal to the defense of this cause. For several years after the assignment, the assignee was kept in ignorance of this asserted debt on account; a circumstance which, connected with the insolvency of Humphrey, renders the transaction suspicious, and gives it a collusive character, as well as the operation of a waiver of the right of offset. The defendant has not in his own conduct displayed that fairness and equity on his part which entitles him to establish his claim as an equitable one against the plaintiff. We are all of opinion that the exception must be overruled; and the judgment of the court of common pleas affirmed.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

TOWSON v. THE HAVRE DE GRACE BANK.

[8 HARRIS & JOHNSON, 47.]

SERVANT OF BANK, WHO IS.—One who receives notes of a bank with the request to pass them off for its benefit, is, *quo ad hoc*, a servant of the bank.

COMMON INNKEEPERS ARE LIABLE for all losses in their inns, happening either by the acts or negligence of themselves or their servants, to travelers and guests received by them.

IDEM, FOR THEFT.—And if a servant is robbed of his master's money or goods, while a guest at an inn, the master may maintain the action against the innkeeper.

AN INNKEEPER IS ONLY ANSWERABLE for money or other property lost at his inn, where the party losing it was a guest at the time of the loss.

THE REASON OF AN INNKEEPER'S LIABILITY in the case of money, from the keeping of which no profit arises, is the profit arising either from the keeping of the horses, etc., of their guests, or from their entertainment.

TO RECOVER FOR THE LOSS OF MONEY or other dead property, it is essential that the plaintiff should allege that he was a guest at the time of the loss.

APPEAL from a judgment in an action on the case, brought by the Havre de Grace bank against Towson, an innkeeper, to recover the value of certain bank notes, the property of the plaintiff, and stolen from their servant while a guest at the defendant's inn. The opinion states the case.

Winder and R. Johnson, for the appellant.

Williams, contra.

By Court, **BUCHANAN, J.** The testimony, substantially, on which the appellees rested their case, as stated in the bill of exceptions, was that John Hogg, intending to go to Baltimore for the purpose of purchasing goods, and having two hundred and fifty dollars in notes of the Havre de Grace bank, applied

to the cashier of that institution for Baltimore paper in exchange, who gave him an equal amount in Baltimore paper, but left the notes of the Havre de Grace bank in the hands of Hogg, and directed him to pass them away in Baltimore, for the benefit of the bank, or if that could not be effected, to return them, which he agreed to do; but there was no loan of the notes to Hogg, and that the arrangement was made entirely for the accommodation of the bank. That Hogg proceeded to Baltimore, taking with him the two hundred and fifty dollars in notes of the Havre de Grace bank, and put up as a guest at the house of the appellant, who was a common innkeeper in the city of Baltimore. That on the evening of the twenty-seventh of September, 1816, Hogg (being then a guest at the house of the appellant), intending to go out, gave his pocket-book, containing the said two hundred and fifty-dollars, to Aaron Wright, the barkeeper of the inn, for safe-keeping; that on the following morning he asked Wright for his pocket-book, who told him that it was locked up in the appellant's room, who had gone to market with the keys, and that under pretense of going to the market, in search of the appellant, in order to procure the key, Wright absconded, and never afterwards returned; that on the return of appellant from market, Hogg asked him for the pocket-book, and told him what Wright had said, who said that it was not in his room, and that what Wright had stated was false, and expressed his fears in relation to the pocket-book. That Hogg had no intimacy with Wright, and did not intrust the pocket-book with him on account of any personal confidence reposed in him, but exclusively on account of his situation in the inn; and that neither the pocket-book nor any of its contents have ever been received or recovered back by Hogg, or the appellees. To which there was no opposing evidence. But it was proved, on the part of the appellant, that Hogg was in the city of Baltimore on his own business, and was alone answerable, and bound to the appellant for his expenses at the inn, and that he never considered the appellees as answerable for them. Whereupon, the opinion of the court and their direction to the jury that the appellees were not entitled to recover, were prayed by the counsel for the appellant, and the court did right in refusing, upon that testimony, to give the opinion and direction prayed; for from the facts set out as furnishing the cause of action, if true, it is clear that the bank notes, which formed the subject of the suit, belonged to the president and directors of the Havre de Grace bank, and that

John Hogg was intrusted and empowered to dispose of them for the benefit of the bank, and was, *quo ad hoc*, the servant of that institution. Common innkeepers, without any particular contract or agreement for that purpose, are answerable for all losses in their inns, happening either by the acts or negligence of themselves or their servants, to travelers and guests received by them; and if a servant is robbed of his master's money or goods, the master may maintain the action against the innkeeper in whose house the loss was sustained. Here it appears that the appellant was a common innkeeper; that the pocket-book, containing the bank notes belonging to the Havre de Grace bank, was given for the safe-keeping by Hogg to the barkeeper of the inn; that the pocket-book and notes were lost, and never regained; and that Hogg, at the time they were so lost, was a guest at the inn, received there by the appellant.

But it is said that it does not appear that the appellees are a corporate body, and had a right or power in law to sue. To which it is answered that the Havre de Grace bank is chartered by an act of the legislature of the state, and that the charter or act of incorporation reserves, for the use and benefit of the state, five hundred shares of the capital stock, to be subscribed for in such manner as the legislature may direct, thus connecting the institution with the fiscal concerns of the state; and in the twenty-second section provides, that any director, officer, or other person holding any share, etc., of the said bank stock, who shall commit any fraud or embezzlement, touching the money or property of the bank shall be liable to prosecution by indictment, in the name of the state. It is, therefore, deemed a public law, which requires not to be proved as a private act, but must be judicially taken notice of as all other public laws. There is nothing in the argument attempted to be drawn from the evidence offered on the part of the appellants, that Hogg was, at the time of the robbing or loss, in the city of Baltimore on his own business, and was alone bound for his expenses at the inn. Innkeepers are answerable, by reason of the profit arising either from the keeping of the horses, etc., of their guests, or from the entertaining of the guests themselves, in the case of money or other property, from the keeping of which alone no profit can arise. So that if a guest goes to an inn, and leaves his horse there with the host, and goes away himself for a time, and in his absence the horse is stolen, the host is chargeable on account of the profit arising from the keeping of the horse; but if he goes away for several days, leav-

ing money, or other dead property there, which is stolen or lost during his absence, the host is not answerable for the loss, as at that time he was deriving no profit or gain, either from the keeping of the money or goods, or from the entertaining of the guest himself. It is the profit then to the innkeeper which alone creates his liability, and it matters not out of whose funds the expenses of the guests are defrayed, it is enough that he receives the consideration, from whence his responsibility arises, the premium for his risk.

Thus, it is said in a case in Yelverton, that "if A. sends his money by a friend, who is robbed in the inn at which he is a guest, A. shall have the action." And there is no reason why it should not be so, the innkeeper being chargeable, not on the ground that he entertains the owner of the money, or other goods, but because he receives, no matter by whom paid, a compensation for the risk. The judgment in this case, therefore, ought to be affirmed, if there was no other objection than that which grows out of the bill of exceptions. But after the verdict, there was a motion in arrest of judgment, and the reasons assigned are that the allegation in the declaration is of the loss of money in bank notes, and that bank notes are not money, and that the declaration is uncertain and insufficient in point of law; which are also insisted on here, as objections to the declaration. The former of these objections, that bank notes are not money, cannot be sustained; they answer all the purposes of money in the ordinary concerns of the community; by common assent, they are treated as money in the payment of debts, the purchase of goods and lands, and in the every day transactions between man and man, and at this hour can only be considered as such. They are a legal tender, unless specially objected to at the time, and will pass by will under the general description of money—as "all my money in such a drawer."

But the other objection is fatal. It is a general rule in pleading that the declaration must show a title in the plaintiff—a legal cause of action. A title defectively set out may be cured by verdict, but the gist, and everything that is of the essence of the action, must be set forth, and that is of the essence of the action, without which, the court could have no sufficient ground to give judgment, though the fact alleged be found for the plaintiff, and may be moved in arrest of judgment. An innkeeper is only responsible for money or other dead property lost in his inn, where the party losing it was a guest at the inn

at the time of the loss, the profit arising from the entertaining of the guests, as before remarked, being the foundation of his liability. In an action, therefore, against an innkeeper, for the loss of such property in his inn, it is necessary to be set out in the declaration that the plaintiff was a guest at the inn at the time of the loss, that being the essence of the action, without which the court could have no sufficient ground to give judgment.

In this case, it was alleged in the declaration that Hogg was a guest at the inn of the appellant on the twenty-seventh of September, 1816, and that afterwards, on the twenty-eighth of September, the money was stolen, without stating that he was a guest there at the time, or on the day that it was taken away, and thus showing no cause of action. For though a guest on the twenty-seventh, *non constat*, that he was there on the twenty-eighth. For anything appearing in the declaration, he might have gone away. It is not the case of a title defectively stated, which might be good after verdict, but one in which no title or cause of action is set out, or foundation laid for a judgment.

The declaration is, therefore, radically defective, and not cured by the verdict; and the motion in arrest of judgment ought to have prevailed.

Judgment reversed.

INNKEEPER'S LIABILITY—WHO ARE GUESTS.—These subjects are discussed in the note to *Clute v. Wiggins*, 7 Am. Dec. 449.

A novel decision, and one involving a question of very general interest, was pronounced in the case of *Hancock v. Rand*, 17 Hun. 279, by the general term of the New York supreme court, in the first department. The plaintiff, General Hancock, in November, 1863, applied to the defendant, the proprietor of the St. Cloud hotel, in the city of New York, for rooms for himself and family, with meals to be served either at their rooms or at the restaurant. Rooms were engaged, and a monthly price, less than the transient rates, agreed to be paid, depending upon the manner in which the meals should be served. The arrangement was to continue until the next summer, unless General Hancock should sooner be ordered away on military duty. In March, 1874, in the absence of the family in the evening, thieves entered their rooms and stole jewelry to the amount of four thousand dollars. In the action for the recovery of the value of this jewelry, the proprietor of the hotel was held liable. The theft was not by an employee of the defendant, and no question arose on the necessity of a deposit in the hotel safe. The court say: "We cannot adopt the theory that ascertaining and fixing the price which was to be paid for the accommodation, and specifying the probable duration of the stay at the hotel, necessarily had the effect to deprive the plaintiff of the character of a guest. The effect of such a theory, reduced to practice, would be to deprive the visitor at a hotel of the character of guest if he took the precaution to ascertain in advance the price which would be charged for his entertainment. 'Although the decisions have not been uniform upon the

question whether fixing in advance the price to be paid, and the duration of stay of a visitor at a hotel, has the effect, in law, to constitute such person a mere boarder or lodger, and to deprive him of the character of guest, yet our examination of the subject has led to the conclusion that, regarding hotels as they are now conducted and patronized, such an arrangement does not necessarily have an effect to prevent the relation of innkeeper and guest, and the obligations which attach thereto.' * * * The law which renders the keeper of a hotel liable for the baggage of the guest which is stolen from the room assigned him, and which remains in the care and supervision of the landlord and the servant whom he selects, is salutary, and should not be rendered substantially inoperative by adopting technical distinctions, which rest upon ingenious speculation, rather than sound reason."

The editor of the Albany Law Journal of July 26, 1879, in a careful article, criticizes this decision, and inclines to the opinion that General Hancock was a boarder, and not a guest. The reasons assigned for this opinion are, in brief: 1. The relation between Hancock and Rand, was founded in contract. Upon a breach of this contract, upon a refusal to pay for rooms for the nine months, unless sooner ordered away, Rand would have his action in damages; 2. Specified rooms were engaged for the nine months, which during that time belonged to Hancock; and, 3. Hancock was not a traveler. The St. Cloud was his only home.

The limitation of an innkeeper's liability in regard to the money of their guests, is thus stated in *Freiber v. Burrows*, 27 Md. 130, 147, after commenting upon the principal case, among others: "We are of opinion that money in the trunk of a guest, at an inn, to constitute a part of his baggage, for which the innkeeper is responsible, should be of such amount only as would be convenient to meet his traveling expenses; and to arrive at this the condition of the guest, his mode of life, his habits, tastes, the nature, character and objects of his journey, must be taken into consideration by the jury; for it is the province of the jury, in such a case, to determine the question of sufficiency, under such directions and limitations as the court can prescribe."

HEUITT v. THE STATE.

[6 HARRIS & JOHNSON, 95.]

WHERE AN AWARD DISCLOSES the grounds on which the arbitrator based his opinion, the case is open to inquiry whether a mistake has been committed in point of law.

THE SHERIFF'S BOND IS AN ANNUAL BOND, and his sureties are liable for his defaults during the time only between the giving the bond passed by them, and the execution of the next year's bond.

IN A CASE OF GENERAL SUBMISSION, an award founded in a mistake of law of the arbitrators, is for that reason impeachable.

APPEAL from the judgment of a county court, on an award between Heuitt and the state, upon a submission to arbitration of the liability of Heuitt and Russell as sureties on a sheriff's bond. The facts appear from the opinion.

Heath, for the appellant.

No attorney appeared *contra*.

By Court, EARLE, J. To the award returned to the court in this cause by the arbitrator, he has annexed a paper containing a statement of the sum awarded to be paid by the appellants to the appellee, and the account on which the same, in his judgment is chargeable to them. This paper is to be considered as part of the award; and as it discloses the ground taken by the arbitrator, in forming his opinion of the subject, the case is open to the inquiry, whether he committed a mistake in point of law, in the decision he made between the parties? The case submitted to arbitration is a joint suit against the appellants, as securities in a sheriff's bond, executed on the eighth of December, 1814, and the sum for which they are rendered liable by the award of the arbitrator, was received by the sheriff for property sold under a *fiery facias*, returned to March term, 1816, of Baltimore county court. It is plain, then, that the arbitrator undertook to determine on the liability in law of the appellants for the money thus received by the sheriff; and that he has in this committed an error, the court cannot entertain a doubt. The sheriff's bond is an annual bond, and the securities of each year are responsible for the neglects, defaults, acts and receipts of their principal, during the time only between giving the bond passed by them, and the execution of the next year's bond by the sheriff. From the date of the process referred to, the sheriff must have remained in office in the year 1816, which he could not have done without executing a further sheriff's bond in the fall of 1815. The securities in this last bond are liable for the money received under the *fiery facias*, if any persons are liable for it, and not the appellants, who were securities in the bond executed in December, 1814. The law question thus disposed of by the arbitrator, he intended to decide according to law, but as he was not informed, and decided erroneously, his determination is not agreeable to his own wishes, and his award ought to have been set aside, on the motion made to the court below for that purpose.

It is to be observed that this is not a distinct question of law, decided by an arbitrator selected by the parties, for the purpose of finally settling a law point between them. When such a case occurs it will perhaps be the court's opinion that they are bound to abide by the award, be it right or wrong: *Price v. Hollis*, 1 Mau. & Sel. 107. The parties here referred to the arbitrator all matters in variance between them, including questions of right and fact, without the slightest intimation from any quarter that the accountability of the appellants for

the receipts of the sheriff in the year 1816, was to be considered and decided on by him. In a case of general submission like this the authorities are clear that an award founded on a mistake in law of the arbitrator is for this reason impeachable: *Kent v. Elstob*, 3 East, 18; *Young v. Waller*, 9 Ves. jun. 364. We therefore disapprove of the judgment of Baltimore county court, and determine that it be reversed.

Judgment reversed

THAT ARBITRATORS MUST ALL MEET and consult, see *Moore v. Ewing*, 1 Am. Dec. 195, and note; *Patterson v. Leavitt*, 10 Id. 98.

THAT FOR A MISTAKE OF LAW AN AWARD will not be set aside in a doubtful case, see *Ross v. Overton*, 2 Id. 552; see, also, *Jocelyn v. Donnel*, post, and note.

BEND v. SUSQUEHANNA BRIDGE AND BANK CO.

[5 HARRIS & JOHNSON, 128.]

SIGNING BY ATTORNEY.—An assignment executed by an attorney stating himself to be such in the body of the assignment, will not be rendered invalid by the attorney's mistake in signing himself as attorney for the assignee.

STOCKHOLDER'S LIABILITY FOR UNPAID INSTALLMENTS.—The assignee of shares of the capital stock of a corporation upon which some installments remained due will be liable therefor, in a suit by the corporation.

AN ASSIGNMENT OF STOCK ABSOLUTE ON ITS FACE cannot be shown by parol to have been intended as a mortgage.

APPEAL from the county court. The opinion states the case.

R. Johnson, for the appellant.

Murray, contra.

By Court, BUCHANAN, J. The action was brought to recover the amount of three installments of five dollars each, on one hundred shares of stock in the Susquehanna bridge and bank company, alleged by the plaintiffs to belong to the defendant. Moses Poor subscribed in his own name for the stock in question, and afterwards duly appointed Samuel Clendenen, his attorney, to transfer it to John H. Poor, in pursuance of which power, Samuel Clendenen did, on the third of October, in the year 1816, transfer the said stock on the bank to John H. Poor, according to the provisions of the charter. On the thirtieth of November, 1816, John H. Poor regularly constituted Samuel Clendenen, his attorney, to transfer the said one hundred shares of stock to the defendant, with his knowledge and con-

sent; and on the tenth of December, 1816, Samuel Clendenen made an assignment of the stock, on the books of the bank, to the defendant in these words: "I, John H. Poor, by my attorney, Samuel Clendenen, do hereby transfer and make over unto William B. Bend one hundred shares of stock held by me in the Susquehanna bridge and bank company, Maryland, on which thirty per cent. has been paid, subject to the payment of the remaining seventy per cent., agreeably to the charter of incorporation;" which is signed and sealed by Samuel Clendenen, and underwritten, "Att'y for Wm. B. Bend." The charter authorizes the transfer of stock at the bank by any holder, either in person or by attorney; and the first question raised in the discussion of the cause is, whether the power given by John H. Poor to Samuel Clendenen was so executed as to transfer the stock in question to the defendant. Of which we have no doubt. It is very certain that in point of law the act done under a power of attorney, must be the act of the principal, and not of the attorney, otherwise it cannot have the effect to bind the principal; and here the act done, that is, the assignment and transfer of the stock, is emphatically the act of John H. Poor. It expressly purports, upon the face of it, to be a transfer of John H. Poor, by his attorney, Samuel Clendenen; and being so expressed in the body of the instrument, it was sufficient for Clendenen to sign and seal it, without any addition of the character in which he acted, that character being before distinctly set out; and as the assignment is clearly expressed, and manifestly appears to be the act of the principal, John H. Poor, through the agency of his attorney, Samuel Clendenen, the superaddition of the words, "Att'y for Wm. B. Bend," cannot have the effect to defeat it; but being repugnant to the whole context, must be rejected on the same principle that where the *habendum* in a deed of bargain and sale is to the grantor, it shall be rejected, and the use inure to the grantee; or, it may be that Samuel Clendenen was as well the agent in that transaction of William B. Bend, as attorney for John H. Poor, and that he placed the words, "Att'y for Wm. B. Bend," under his signature to denote that agency. That he could not have been the attorney of Bend, for the purpose of making the transfer, is most manifest, he being the party receiving, and not the party making the assignment; and it is not easy to suppose that Clendenen, in adding the words, "Att'y for Wm. B. Bend," intended to deny his agency for John H. Poor, which he had before so distinctly affirmed. It

was, therefore, either an act of mere inadvertency, or it was done to show the double capacity in which he may have acted; and in neither case does it vitiate the assignment, but is wholly inoperative. It is enough that the transfer was made in the name of John H. Poor, and that it sufficiently appears to be his act, through the agency of his attorney, for which no particular form of words is required to be used.

As to the question, whether there is such a privity between the plaintiffs and the defendant, as to enable the plaintiffs to sustain an action of assumpsit against the defendant for the amount of the installments, which form the subject of the suit, there can be no doubt the transfer of stock by the holders is authorized by the charter; and, by the assignment, the assignees are substituted in the places of the original subscribers and hold the shares on the same conditions, and are subject to the same rules and orders. The calls for the installments in question were made by the plaintiffs in pursuance of the provisions of the charter, and after the transfer by John H. Poor to the defendant; and the charter authorizing the transfers of stock, and declaring all "who may become the actual proprietors of shares in the capital stock, either as subscribers for the same, or as legal representatives, successors, or assignees of such subscribers," to be a body politic and corporate, necessarily creates a privity and raises an assumpsit on the part of such as choose to become stockholders, by accepting transfers to pay all such calls as may be regularly made, on which an action will properly lie. Moreover, by the very terms of the assignment, the defendant took the stock, subject to the payment of the whole amount that was then unpaid; and it is no objection to say, that such a construction of the charter would be injurious to the bank, on the ground that it would thereby lose its remedy against the original stockholders, seeing that the charter has provided an abundant security against loss, by creating adequate forfeitures for non-payment of the installments called for, and prohibiting any transfers by stockholders indebted to the bank, until such debts shall be paid. In support of the position that the defendant is answerable in an action of assumpsit for the amount of the calls made since he received a transfer of the stock, if indeed such a position needs any support, see the case of *The Huddersfield Canal Company v. Buckley*, 7 T. B. 36, which is directly in point.

At the trial of the case below, the defendant offered evidence to prove that the assignment of the stock in question was not

intended as an absolute transfer, but as a mortgage to secure a debt due to him from John H. Poor, which was rejected by the court; and it is urged here in argument that the testimony ought to have been admitted; which presents the constantly returning question, whether parol evidence is admissible to contradict a written instrument? Assuming different shapes, and varying with the various transactions between man and man, and each claiming to be an exception from the general rule, "that parol evidence cannot be admitted to contradict, add to, or vary, the terms of a will, deed, or other written instrument." It is not necessary to inquire, how far the liability of the defendant in an action of assumpsit for the amount of the installments claimed in this suit, would be affected by the fact, if true, that he holds the stock only as a mortgagor, if the evidence offered to establish that fact was properly rejected; and we think that it was clearly inadmissible, being offered by an immediate party to a sealed instrument, to contradict and change the terms of it, for the purpose of defeating rights claimed, and growing out of that very instrument alone, with nothing to take it out of the operation of the general rule of evidence, but in direct violation of it.

Judgment affirmed.

IF AN ORIGINAL SUBSCRIBER TRANSFERS his stock in a corporation to another with his assent, the transferee is substituted not only to the rights but also to the obligations of the transferor: *Hall v. U. S. Ins. Co.*, 5 Gill, 484; *Hartford R. R. Co. v. Boorman*, 12 Conn. 539; *Mann v. Currie*, 2 Barb. 294; *Cowles v. Cromwell*, 25 Id. 413; *West Phila. Canal Co. v. Innes*, 3 Whart. 198; *Merrimac Mining Co. v. Bagley*, 14 Mich. 501; *Merrimac Mining Co. v. Levy*, 54 Pa. St. 227. And the payment of installments by such transferee (*Hall v. U. S. Ins. Co.*; *Mann v. Currie*) will be evidence of such assent. The mere assignment of his share, by a subscriber, will not relieve him from liability until the assignee is substituted in his place: *Burke v. Smith*, 16 Wall. 400. And as the subscription to the capital stock creates a debt against the subscriber in favor of the corporation, this substitution of a transferee, so as to release the transferor, cannot take place without the sanction of the corporation: *Graff v. Pittsburg etc. R. R. Co.*, 31 Pa. St. 489; *Ryder v. Altou R. R. Co.*, 13 Ill. 516.

This question received the consideration of the supreme court of the United States in *Webster v. Upton*, 91 U. S. 65. After an examination of many of the cases above cited, as well as others which apparently hold a different rule, Judge Strong, speaking for the court, said: "We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder, and his name has been registered on the stock books as a corporator; and being thus liable, there is an implied promise that he will pay calls made while he continues the owner." And reference is made to the following language used in Angell and Ames on Cor., sec. 534: "When an original subscriber to the stock of an incorporated

company, who is so bound to pay the installments on his subscription from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted not only to the rights; but to the obligations of the original subscriber, and he is bound to pay up the installments called for after the transfer to him. The liability to pay the installments is shifted from the outgoing to the incoming shareholder. A privity is created between the two by the assignment of the one and the acceptance of the other, and also between them and the corporation; for it would be absurd to say, upon general reasoning, that if the original subscribers have the power of assigning their shares, they should, after disposing of them, be liable to the burdens which are thrown upon the owners of the stock."

See, further, upon the rights and liabilities of the transferee, Thompson on Stockholders, sec. 210.

SEEGAR v. THE STATE.

[6 HARRIS & JOHNSON, 182.]

WHERE THE SAME PERSON IS ADMINISTRATOR AND GUARDIAN of the heir, the balance, upon final settlement, shall be considered as in the hands of the guardian.

ITEM—EVIDENCE.—Where the guardian of the heir intermarried with the administratrix of the decedent, and thereby came into the possession of the personalty of the estate, in an action on the guardian's bond, after the rendition of the final account of the administration, it was held that the administratrix and her sureties were, by such rendition, released and discharged, and, therefore, competent witnesses in the action.

APPEAL from the county court. The opinion states the case.

Carmichael, for the appellants.

Harrison, *contra*.

By Court, **MARTIN, J.** This was an action instituted in the name of the state, for the use of Joseph E. Betton, against the executors of Thomas Seegar, upon a guardian's bond. There was a judgment by default, and a proceeding in the nature of a writ of inquiry to be executed at the bar, was ordered by the court. On the trial, two bills of exceptions were taken by the counsel for the defendants. The first, an objection to the competency of a witness produced on the part of the plaintiff; and the second, upon the merits of the question then depending before the jury.

It appears from the record that letters of administration were granted to Elizabeth Betton on the estate of her deceased husband, Turbutt Betton, on the thirteenth of June, 1809. Thus being the administratrix of her husband, and as such possessed of his personal estate, she sometime, early in the year 1810

(twelve months after the death of her first husband), intermarried with Thomas Seegar. That Thomas Seegar and his wife went on to settle the estate of Turbutt Betton. They returned, as administrators, several accounts to the orphans' court, and on the thirteenth of February, 1816, rendered a final account, admitting a balance in their hands of three thousand three hundred and eighty-five dollars and sixty-three cents and one half. One third of this balance, one thousand one hundred and twenty-eight dollars and fifty-four cents, Thomas Seegar had a right to retain as the property of his wife, leaving the sum of two thousand two hundred and fifty-seven dollars and nine cents in his hands, to be paid over to the representatives. On the twenty-ninth of July, 1810, Thomas Seegar was appointed guardian to Joseph E. Betton, and entered into the bond, upon which this suit has been brought.

It is an established principle of law that where the same person, who acts as the administrator of a deceased party, is appointed guardian to the representatives, that whatever balance is in his hands at the rendition of a final account (and perhaps even prior to that time), is in his hands and possession, not as administrator to the deceased, but as guardian to the representatives. This transfer is by operation of law. The administrator having in his hands a balance that ought to be paid over to the guardian, and one person representing both these characters, he cannot pay the money over to himself; nor, if the payment was refused, is there any person who could enforce it. Under these circumstances, the law, by implication, considers it in the hands and possession of the party in that representative character that ought to receive it. Thomas Seegar, acting as administrator of Turbutt Betton, in consequence of his marriage with Elizabeth Betton, the administratrix, and admitting by his final account that he had a balance of two thousand two hundred and fifty-seven dollars and nine cents in his hands due to the representatives, and being at that time the guardian of Joseph E. Betton, whatever sum was due to him was, by operation of law in the hands of Thomas Seegar as his guardian. The administratrix and her securities on the estate of Turbutt Betton, were completely discharged and released from all responsibility on account of it, and Thomas Seegar and his securities became answerable for it on his guardian bond. But it is contended that, although the general rule where the same person is both administrator and guardian, the balance, upon a final settlement of the deceased's estate, shall be considered in

the possession of the guardian, is correct, the executors of Thomas Seegar ought not to be accountable for the whole amount of the sum stated to be due by the final account, because it is in proof that the whole property did not come to his hands and possession, but that a considerable part was wasted by the wife before her marriage with Thomas Seegar.

If the amount of property wasted by the wife before her intermarriage with Thomas Seegar, had been more than the sum she was entitled to receive upon the settlement of Turbutt Betton's estate, a question might arise, which is not necessary to be considered in this case, as it is not brought into view by the testimony in the record. It appears, from the final account on Turbutt Betton's estate, that the sum of three thousand three hundred and eighty-five dollars and sixty-three and a half cents, was in the hands of the administratrix and her husband, to be distributed according to law. One third of this sum, one thousand one hundred and twenty-eight dollars and fifty-four cents, was due to the widow as her part of the estate. Before her marriage with Thomas Seegar, she had wasted property to the amount of three hundred and eighty-two dollars and seventy-nine cents. The amount of property thus wasted by her would be considered, in law, as so much received by her in part payment of the sum due to her upon the settlement of the estate, and her husband, in right of his wife, would be authorized to retain only so much as she would have been entitled to receive had she remained sole. The sum wasted by the wife not being equal to that she was entitled to retain as the widow of Turbutt Betton, it clearly follows that Thomas Seegar, at the time he rendered his final account, was in possession of the whole amount of the sum due the representatives, after deducting the widow's third.

This statement disposes of both exceptions. If Elizabeth Seegar and her securities on the administration bond are, by operation of law, entirely released and exonerated from the debt due to Joseph E. Betton, we cannot see that she has any interest that would exclude her from being a witness in this cause.

The judgment of the court below is affirmed on both of the bills of exception.

Judgment affirmed.

PATAPSCO INS. CO. v. SMITH.

[6 HARRIS & JOHNSON, 166.]

A PROMISSORY NOTE is not an extinguishment of a pre-existing debt. Upon non-payment the creditors may sue on the original contract.

THE NOTE OF A THIRD PERSON, given by the vendee to the vendor, does not extinguish the original contract, unless it was received as payment of the debt.

APPEAL from the county court. The opinion states the case.

Winder and Mayer, for the appellants.

Raymond, contra.

By Court, STEPHEN, J. This action of assumpsit was instituted in the Baltimore county court, by the Patapsco Insurance company against the defendants, to recover the sum of one thousand three hundred and fifty-one dollars and twenty-five cents, the premium stipulated to be paid for the insurance of the cargo of the British brig Ann, at and from Buenos Ayres to Baltimore. The application for insurance is in the following words: "Lyde Goodwin wants insurance for self and others on cargo per the British brig Ann, Anderson, master, at and from Buenos Ayres to Baltimore," etc. This application was accepted by the office, the policy executed, and on the same day, Goodwin, with a certain George P. Stevenson, as his surety (who was not in any manner interested in the subject-matter of the insurance), gave their negotiable promissory note for the payment of the premium of the policy of insurance to the plaintiffs. Payment of this note, on its arrival at maturity, was legally demanded, and not being paid, a protest was made by a notary public, in the usual manner, for non-payment. It is admitted, in the case stated, that no notice was given to the defendants of the non-payment of the note, or any demand made on them by the plaintiffs for payment of the premium of insurance, until the day the note became due. That the defendants, before the above-mentioned note became due, paid to Goodwin their respective proportions of the premium of insurance, without the knowledge or privity of the plaintiffs. That Goodwin, at the time he applied to the office for insurance, did not disclose the names of the owners of the cargo of the Ann, and that the parties interested in the insurance, or in other words, the defendants, were not known as such to the insurers, until some time after the policy had been executed. On the non-payment of the promissory note, given for the premium of

insurance, this action was instituted to recover the same from the defendants, on the ground of an assumpsit legally implied to pay the same; and the question which this court is called upon to decide is, whether such a suit, under the particular circumstances of the case, can be sustained upon the established principles of law. In a state at present highly respectable for its standing in a commercial point of view, and promising, by a gradual development of its faculties, to make still further advances in that respect, at no very distant day, questions relating to the laws of trade and commerce must at all times be deemed of the highest importance. It is, therefore, much to be desired, that in judicially deciding upon such principles, especially in the *dernier resort*, the utmost accuracy should be attained, and the doctrine of the law-merchant settled upon the firmest and most stable foundation. The first question to the consideration of which the mind is forcibly drawn in this case is, what was the legal effect of the note given by Goodwin and Stevenson upon any legal liability which might have attached upon the defendants in the absence of such note? The law is clear that where a debtor gives his promissory note on account of a pre-existing simple contract debt, such note does not merge or extinguish the debt due on simple contract; but that the creditor, on non-payment of the note, may resort to the original cause of action, and sue upon it.

This doctrine is founded upon the principle that both causes of action are of equal dignity in the eye of the law, and therefore in legal construction, the one does not merge or extinguish the other. This principle is too well settled to need the aid of authority to support it. Where a party, at the time of contracting a debt, assigns the note of a third person to the vendor, such note does not extinguish the original cause of action, unless it was received as payment or satisfaction of the original contract. To this effect see the case of *Clark v. Young*, 1 Cranch, 181. The principle here established goes to prove that a promissory note executed by the debtor and a third person, at the time the debt is contracted, does not wholly extinguish the simple contract, or original cause of action. In this case the note passed by Goodwin and Stevenson to the insurance company was a negotiable instrument, payable to order. If the note had been passed away or indorsed by the company, the law is clear that no action could be sustained upon the primary cause of action; but it appears from the case stated that at the time the note became payable, it remained in the

possession of the payees, and had not at that time been negotiated. In support of the doctrine here stated, *Harris v. Johnston*, 3 Cranch, 311, and *Holmes v. D'Camp*, 1 Johns. 34 [3 Am. Dec. 293], are referred to. In the last of which cases the judge says that, "technically speaking, a negotiable note is not an extinguishment of an antecedent debt, yet it has been deemed an extinguishment *sub modo*." He further goes on to remark that where a negotiable note has been given for a prior debt, the plaintiff should not be suffered to recover on the original consideration, unless he shows the note to have been lost, or produces and cancels it at the trial. As before remarked, the fact in this case is admitted to be (at least the contrary does not appear), that the note remained in the possession of the party at the time it was due, and, of course, could not afterwards be negotiated without subjecting the party receiving it to every defense which might be set off against the person to whom it was originally payable. From these principles and the authorities referred to in support of them, it results that the note given by Lyde Goodwin and George P. Stevenson would not, *per se*, be sufficient to extinguish the simple contract debt, if under the circumstances of the case the law would imply a promise on the part of the defendants to pay the premium of insurance to the plaintiffs. The question, however, still arises, did the law imply such promise? It is admitted that at the time Goodwin applied for insurance, his application was made for himself and others. He did not disclose at that time, nor was he requested to do so, who those persons were, for whose benefit, as well as his own, the insurance was applied for. The insurers were, therefore, manifestly satisfied with the responsibility of Goodwin and Stevenson, and did not intend to look to the other defendants for payment. It is most evident that the insurance was effected by Goodwin, as their agent, and not as copartner; and it fully appears that he was so considered by the assured themselves, because, before the premium note became due, the defendants paid to Goodwin, their agent, their respective proportions of the premium.

In *Patterson v. Gandasequi*, 15 East, 62, the law is clearly settled to be, that if the vendor of goods, knowing that the buyer who deals with him in his own name is in truth the agent of another, elect to give the credit to the agent, he cannot afterwards recover the value against the principal; but if the principal be known at the time of the purchase, when discovered, he or the agent may be sued at the election of the seller. It is true

that the defendants in this case were not named to the plaintiffs, but sufficient was disclosed to the insurers to apprise them that the insurance was not for the benefit of Goodwin alone, but for himself and others, which was sufficient to put the insurers on inquiry, if they had not been satisfied with the liability of Goodwin and Stevenson alone. Grose, J., says: "I think that the plaintiffs in this case might have elected whom they would have for their debtor; and here they seem to have made their election." The court are, therefore, of opinion that there was no error in the judgment of the court below.

error in the judgment of the court below.

Judgment affirmed.

BANK OF COLUMBIA v. MAGRUDER.

[6 HARRIS & JOHNSON, 172.]

THE MAKER IS A COMPETENT WITNESS on behalf of the plaintiff in an action by the indorsee against the indorser of a promissory note, judgment having been recovered against the maker on such note.

CUSTOM AFFECTING DEMAND AND NOTICE.—Where demand and notice were not made until the day after the third day of grace, in conformity to the established practice of the bank, the holder, such demand and notice were held sufficient to charge an indorser who had knowledge of the practice.

DEFECT IN A DECLARATION in an action on a promissory note, in alleging demand and notice, must be taken advantage of on demurrer, or by way of exceptions to the admissibility of evidence at the trial.

MAILING NOTICE OF NON-PAYMENT of a promissory note, by addressing the same to the post-office nearest to the residence of the party entitled to notice, will be sufficient.

IDEM.—Where the notary has made inquiries concerning the residence of the maker, and the post-office where he receives his letters, and sends the notice to such office, the court will presume that to be the post-office nearest to the indorser, in the absence of proof to the contrary.

APPEAL from the county court. The opinion states the case.

Jones and F. S. Key, for the appellants.

T. B. Dorsey, *contra*.

By Court, EARLE, J. There were two bills of exceptions signed in the trial of this case, which, from the record, appears to be a suit brought by the president, directors and company of the bank of Columbia, as indorsees of a promissory note, against the administratrix of Thomas C. Magruder, the first indorser. The note was drawn by George Magruder, on the second of February, 1815, and made payable to the appellee's intestate, sixty days after date, and payment of it is stated in

the declaration to have been demanded on the seventh of April, 1815, which is the day after the usual days of grace. The plaintiffs produced George Magruder, and offered to prove by him that the note was discounted at bank to raise money for Thomas C. Magruder, alleging that he was in truth the drawer, and not entitled to notice. He was objected to on the score of interest, and rejected as an incompetent witness to prove the facts for which he was produced, and from the rejection has arisen the only question this court has to decide on the first bill of exceptions. George Magruder, on the *voire dire*, expressed his doubts of his interest in the event of the cause, and represented it to depend upon the solution of a question which was not solved by the court, and which, perhaps, from his statements they could not answer, if it had been their province to decide. We do not then consider him a witness, declaring himself on oath to be interested, nor as a witness, believing himself to be so, in neither of which lights has he been contemplated by us in the opinion we have formed on this subject.

Independent of the views he has himself taken of his situation, the true question is, has he, in fact, such a direct interest in the event as ought to exclude him from giving testimony on behalf of the appellants? If he has such an interest, this court has been unable to discover it. A recovery against the administratrix of the indorser, will put nothing into his pocket; and as a judgment has already been obtained against him as the drawer of the note, it will not screen him from an execution, which the bank may at any moment issue against him. Should the case be established on his testimony against the administratrix, and the principal, interest and costs recovered of her, she will have her remedy against him as drawer, and it is not easy to perceive how the evidence given by him or the verdict founded on it, could any way benefit him in the defense he may please to set up to her action. If the account he has spoken of is used in bar of her suit, it must be supported by competent testimony, wholly unconnected with his narrative concerning the original negotiation between him and the indorser; and he can have no advantages in such defense which he would not have in an action instituted against the administratrix on the same account. A recovery in this cause against the administratrix will carry the costs, and as far as they go, will augment her demand against George Magruder; and in this view he may be said to be a witness swearing against his interest. Deeming him every way a competent witness, we think he ought not to have been prevented from giving testimony for the plaintiffs.

The second bill of exceptions embodies all the testimony in this cause. The appellants, who were the plaintiffs in the court below, having by competent testimony offered to prove, among other things, that it had been the uniform and unvaried practice and custom, from the year 1792 to the year 1818, of the bank of Columbia, and of all the other banks of Washington and Georgetown, to demand payment of promissory notes, of the drawers thereof, on the day after the last day of grace, and in default of payment, to give notice on the same day to the indorsers; and having offered to prove that the indorser, Thomas C. Magruder, had a knowledge of this custom, and the universality of it, by showing that in the year 1813 he received an accommodation in the Union bank of Georgetown, on a note drawn by himself for a considerable sum of money, which was continued in that bank; and having also offered to prove, by the testimony of the clerk of the notary public, that he demanded payment of the note of the drawer, George Magruder, on the seventh day of April, 1815, which was refused; and that on the same day he gave notice of the demand and refusal to the indorser, Thomas C. Magruder, in a letter put into the post-office in Georgetown, addressed to him as residing near that place, being previously instructed, by the best information he could get, that he resided near Georgetown, and that it was usual to forward notices or letters to him through the medium of the Georgetown post-office, addressed to him near Georgetown; prayed the court to instruct the jury that if they believed from the evidence the custom to have been as stated, and to have been known to the defendant's intestate at the time he indorsed the note, then it was competent to the jury to presume that the intestate consented to the said custom and agreed that the demand and notice should be conformable to the said custom; and that if the jury believed, from the evidence that the notary public used due diligence to ascertain where the intestate lived, and where to address the notice to him, and did address the same to him accordingly, then the same said notice is sufficient; and if the demand and notice was made and given according to the aforesaid custom of the banks, then the plaintiffs are entitled to recover. This instruction was refused, and the refusal has given rise to the discussion of several points in this court, two of which we shall proceed briefly to examine. One relates to the time of demand of payment of the drawer of the note, and the other to the legal sufficiency of the notice given to the indorser.

The demand was made on the day after the three days of grace, and cannot create a responsibility on the indorser, unless it was made in conformity to the established practice and custom of the bank, which were well known and understood by him. Had the prayer been gratified by the court, these facts would have been investigated by the jury, and if established against the indorser, they would inevitably have led to the conclusion that he was liable to the plaintiff's action. A custom like this, brought home to the knowledge of the party dealing with the bank, enters into the essence of the contract, becomes a constituent part of it, and must have its due weight in the exposition of it. The allowance of three days of grace in the payment of negotiable paper, from long and universal usage, has become the general law of such contracts, but it is not such an inflexible rule as admits of no innovations upon it.

It may be altered and controlled by the agreement of the parties, and what is tantamount, it may be changed by the usage and custom of dealing perfectly known to the parties, and to which they will be supposed to have had special reference in making their contract. If it was an established and unvaried usage of the bank of Columbia to exceed the three days of grace, and to demand payment on the fourth day, and this was well known to Thomas C. Magruder, at the time of the indorsement, he is to be supposed to have assented to it; and this departure from the general rule will be sanctioned to give efficacy to the contract, and to establish his liability to pay the money. It gives us pleasure to know that we are supported in those ideas by the supreme court of the United States. In their late decision of the case of *Renner v. The Bank of Columbia*, 9 Wheat. 581, they have fully recognized them. The opinion of the court, delivered by Judge Thompson, is an able exposition of the law of commercial contracts, and of the legal influence the custom and usage of particular banks may have upon them, and will unquestionably be regarded by all as a commanding authority on such subjects. We close this part of the case with a single remark in answer to the objection taken on the argument to the declaration in the cause. It is this, that however faulty it may be in stating the demand on the fourth day, or in omitting to state the custom, and the indorser's knowledge of it, upon neither of which points do we now undertake to decide—the objection cannot at this time be supported. If there is anything in the allegation, advantage ought to have been taken of it on demurrer, or perhaps on the trial, by way of exception to

the admissibility of the evidence, and in neither of these forms can it be considered.

With regard to the notice to the indorser of the demand on, and refusal of payment by the drawer, it too would have been examined by the jury, if the instructions asked for on this head had been given by the court. If it had been ascertained by the jury that the clerk of the notary public had demanded payment of the note of the drawer on the seventh day of April, 1815, according to the usage and custom of the bank before alluded to, and that on the same day he gave notice of the demand and refusal to the indorser, in a letter put into the post-office in Georgetown, addressed to him as residing near that place, having been previously instructed by the best information he could get, that the indorser resided near Georgetown, and that it was usual to forward notices or letters to him through the medium of the Georgetown post-office, addressed to him near Georgetown, we can have no doubt that this would have been sufficient notice to charge the indorser. When the party to be affected by the notice resides in a different place from the holder, the rule is, that the notice may be sent through the post-office to the post-office nearest to the party entitled to such notice: *Ireland v. Kip*, 11 Johns. 231; *Freeman v. Boynton*, 7 Mass. 483. Here the rule, we think, has been complied with, considering, as we must do, the post-office at Georgetown to be the post-office nearest to the indorser, in the absence of all proof that there was a post-office nearer to his residence.

We, therefore, dissent from the opinions expressed by the court below in both of the bills of exceptions.

Judgment reversed, and *procedendo* awarded.

Upon the point decided in the first division of the syllabus this case is examined and relied on in *Schley v. Merritt*, 33 Md. 352, 359; upon the soundness of the position taken in the second division of the syllabus, the case is referred to in *Lyon v. Scott*, 44 Id. 301; and upon the sufficiency of a mailed notice of non-payment, it is followed in *Tate v. Sullivan*, 30 Md. 471.

LAMBORN v. WATSON.

[6 HARRIS & JOHNSON, 252.]

JURISDICTION IN CASES OF FRAUD.—Courts of law, as well as of equity, have cognizance of fraud; but courts of law relieve against it negatively, by inquiring into the circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained. Principle applied to a parol agreement between the purchaser at an execution sale and the defendant, whereby the land was to be bought for the latter's benefit.

APPEAL from the county court in an action on the case. The facts appear from the opinion.

Mitchell, for the appellant.

R. Johnson, contra.

By Court, BUCHANAN, C. J. We must take this case as we find it, which, as presented by the declaration and bill of exceptions taken at the trial, is substantially this: Sundry writs of *fiery facias* being sued out upon judgments obtained by Buckler Bond against Daniel Lamborn, the plaintiff, and placed in the hands of Jason Moore, the sheriff of Harford county, he levied them upon the land and real estate of Lamborn who attended at the time and place assigned by the sheriff in his advertisement for the sale of the property, and perceiving that it would not sell for its real value at that time, entered into an agreement with John Watson, the defendant, that he should bid it off for and upon his, Lamborn's, account, to enable him thereby to gain time to raise the money to satisfy the executions. Watson did accordingly bid off the property at less than its value, but afterwards, conceiving the design of turning the originally pretended purchase to his advantage, entered into a fraudulent engagement with Moore, the sheriff, to retain it for their mutual benefit, and refused to relinquish it to Lamborn, who had made an agreement with Bond, the creditor at whose instance it was seized, for the payment of the whole amount due to him, with all the accruing costs and charges.

For that violation by Watson, of his agreement, this suit was brought, and he rests his defense on the statute of frauds, which probably generates as many frauds as it prevents. The expedient resorted to by the plaintiff to prevent an actual sale, in order to gain time, may not be altogether free from exception; but looking at this case, as it appears in the record, more disgraceful conduct than that both of the defendant and Moore, the sheriff, has perhaps seldom found its way into a court of justice, and the defense set up is entirely of a piece with it; yet, as the case is presented, we are constrained to sustain that defense. The action is not founded on deceit, misrepresentation or fraud, practiced by the defendant, by which the plaintiff was tricked into a false confidence, and seduced into a contract, by which he has lost his property; but on a verbal agreement, respecting the sale of lands, not sought for, or moving from the defendant, but procured by the plaintiff himself, for his own purposes, on which, without overturning the statute of frauds,

an action at law will not lie, being clearly within the statute from the operation of which the subsequent abuse by the defendant, in collusion with the sheriff, of the confidence reposed in him, cannot have the effect to rescue it. If the plaintiff could be permitted to recover on this agreement, there is no case in which the statute could prevail, and it would become a dead letter.

Courts of law as well as of equity, have cognizance of fraud; but courts of law relieve against it negatively, by inquiring into the circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained, and thus virtually annulling such deeds or contracts as against the fraudulent parties.

But they cannot entertain actions upon verbal contracts within the statute, on the ground of fraud, in refusing to perform them; if they could, it would be to permit a plaintiff, in the shape of an action on the contract, to recover in damages, not for the breach of the contract as such, but for a fraud subsequently conceived and on which the action was not founded (as is attempted in this case) which would be to annul the statute in relation to such contract.

Judgment affirmed.

The plaintiff Lamborn, in a subsequent action on the case in the nature of deceit against the sheriff, reported in 6 Harris & J. 422, under the title *Lamborn v. Moore*, sought to recover on the same facts as stated in the above decision, declaring in addition thereto that Moore had given the plaintiff and Watson until the Monday succeeding the sale in which to raise the money and pay the executions, and alleging fraudulent and collusive conduct on Moore's part in advising Watson to retain the land for their benefit. The court refer to the principal case and said: "Can this action, growing out of the same conduct, be supported? The defendant here was not a contracting party in the agreement anterior to the sale, but he is charged with secretly colluding with, advising and aiding Watson to hold the property by virtue of his bid, that they might sell the same for a larger sum on their own account and for their own benefit, and share the profits between them, and with retaining the property sold to Watson, and satisfying the executions. This is the gist of the action, and is in substance the same facts that formed the ground work of the suit against Watson. Notwithstanding the fraud that supervened, the non-execution of the agreement by him was held not to be actionable, and his counselor, however reprehensible we think him, cannot be exposed to greater liabilities. To the adviser the same law must be meted as was measured to the advised. They are in *pari delicto*, and a higher punishment ought not to await the one than the other, and if the breach of Watson's contract is unsusceptible of being enforced for one purpose, it should be so deemed for every purpose. Whatever abhorrence, therefore, we may feel for the conduct of Moore, as portrayed in the record, we must decide that

the action against him is not supported. There is one particular in which this case may be said to differ from that against Watson, although in our opinion it does not lead to a different result. Moore is charged with violating his agreement to give the plaintiff and Watson until the Monday following the sale to raise the money, and pay off the executions, and it was insisted on the argument to be the foundation of this suit. But it evidently cannot be so considered; and from the complexion of the case, is plainly an item of the deceptions conduct imputed to the defendant, as manifesting a disposition in him to aid Watson in defrauding the plaintiff. If it was viewed, however, as substantive ground of action, we cannot see how it could be made to support the plaintiff's case. It is not an undertaking to the plaintiff singly, but to him and Watson, and the latter, at least, was not for exacting an observance of it." The principal case is explained in *Baker v. Wainwright Bros.*, 36 Md. 352.

SPECIFIC PERFORMANCE OF CONTRACTS WITHIN THE STATUTE OF FRAUDS.
—There are cases in equity where the specific performance of a contract will be decreed, although the contract be within the statute of frauds, when the non-compliance with the terms of the statute has been occasioned by the contrivance, deceit or false representation of the defendant: Pomeroy on Contracts, sec. 142 *et seq.* "It is at all events a well settled doctrine of equity, notwithstanding the statute of frauds, or the American statutes relating to wills, and the mode of raising trusts, that wherever a person acquires the legal title to lands by means of a verbal promise to hold them for a certain specified purpose; as for example, a promise to convey them to a designated individual, or to reconvey them to the grantor, and the like, and having thus obtained the title fraudulently, retains, uses and claims the lands as his own absolutely, so that the whole transaction, by means of which the ownership was obtained, is based upon deceit, and is, in fact, a scheme of actual fraud; such party is regarded as holding the lands charged with an implied trust arising from his fraud, and he will be compelled by a court of equity to execute this trust by performing his engagement, and by conveying the estate in accordance with his promise. The statutory requirement that a trust must be created by a written instrument, does not apply to such a case, since trusts *ex maleficio* are either expressly or tacitly excepted from its provisions: *Hunt v. Roberts*, 40 Me. 187; *Hodges v. Howard*, 5 R. I. 149; *Fraser v. Child*, 4 E. D. Smith, 153; *Hoge v. Hoge*, 1 Watts, 214; *Cousins v. Wall*, 3 Jones Eq. 43; *Cameron v. Ward*, 8 Ga. 245; *Jones v. McDougal*, 32 Miss. 179; *Martin v. Martin*, 16 B. Mon. 8; *Arnold v. Cord*, 16 Ind. 177; *Nelson v. Worrall*, 20 Iowa, 469; *Coyle v. Davis*, 20 Wis. 593; *Hidden v. Jordan*, 21 Cal. 92; *Sandfoes v. Jones*, 35 Id. 481; *Laing v. McKee*, 13 Mich. 124. This doctrine is often used with salutary efficacy in cases where at an execution sale, or sale under a mortgage foreclosure, or other similar public sale, a party buys in the land under a prior promise made to the execution, or mortgage debtor, or other interested owner, that he, the purchaser, will take the title, and hold the land for the benefit of such owner, and will reconvey to him on being repaid the amount advanced for the purchase-price, and having thus by fraudulent contrivance, cut off competition, and obtained the property for perhaps less than its value, refuses to keep his promise, and retain the land as absolutely his own. Equity will interfere on behalf of the defrauded owner, and compel a conveyance in accordance with the trust *ex maleficio*: *Rose v. Bates*, 12 Mo. 30; *Moore v. Tisdale*, 5 B. Mon. 352; *Letcher v. Crosby*, 2 A. K. Marsh. 106; *McCulloch v. Cowher*, 5 Watts & S. 430; *Kisler v. Kisler*, 2 Watts, 323; *Schmidt v. Gatewood*, 2 Rich. Eq. 162; *Green*

v. Ball, 4 Bush, 586. * * * In order, however, that the general doctrine above stated can be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute would be virtually abrogated; there must be an element of actual, positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated." Pomeroy on Cont. sec. 144. Other decisions supporting the position taken by Pomeroy, are *Ryan v. Dox*, 34 N. Y. 307; *Wheeler v. Reynolds*, 68 Id. 227; *Dodd v. Wakeman*, 26 N. J. Eq. (11 C. E. Green), 484; *Kellum v. Smith*, 23 Pa. St. 158.

SALISBURY v. BLACK.

[6 HARRIS & JOHNSON, 293.]

WHEN TIME COMMENCES TO RUN.—In an action by an executor on the bond of a legatee, conditioned for the repayment of the legacy in case a deficiency of assets should arise, it was held that the statute of limitation commenced to run from the discovery of the deficiency of the assets, and not from the date of the bond.

APPEAL from the county court. Black brought an action of debt against Salisbury and another on their bond, conditioned for the repayment to Black, in case of the deficiency of assets, of the amount of the legacy paid them under the will of George Black, whose executor the obligee in the bond, the testator of of the plaintiff below, was. The bond was dated in 1797—the deficiency of assets was not discovered until 1814, upon the filing of the account. The statute of limitations was pleaded, and the question presented for the consideration of the court was, whether the action was barred or not.

The county court gave judgment for the plaintiff below, whereupon the defendant appealed.

Carmicheal, for the appellant.

Chambers and Harrison, for the appellee.

By Court, *ARCHER, J.* It has been contended in this case that the statute of limitations is a bar to a recovery in this action. This question depends upon the ascertainment of the time when the cause of action accrued. The appellants allege that it accrued at the period assigned by law for the passage of a final account in the orphan's court. Such a determination would limit the terms of the contract; for the parties have fixed no limited period for the ascertainment of a deficiency of assets. There is no stipulation to that effect. But the express agreement is that the money should be refunded whenever a deficiency shall actually happen. The authorities cited in favor of

this position, referring to cases in which the party who derives a benefit from the contract stipulates to do some act, before the benefit of which he is in pursuit is recoverable, are inapplicable to this case, for the obligee had never agreed upon any definite period at which the deficiency should appear. The only evidence which the statement furnishes of this deficiency, are the accounts and proceedings of the orphans' court. By an examination of these, it will be found that the goods of the testator were never fully administered until the year 1814, at which period a very considerable deficiency appears. But it has been urged that from an examination of the dates of the several disbursements for which allowances were claimed, it appears there was a deficiency of assets at the time of the death of James Black, in 1803. It is manifest from an inspection of the evidence, that at the very time the bond was executed, there was an insufficiency of assets. Yet the fact was not ascertained, nor could it be known, until the goods which had come to the executor's hands, were administered. When the account of the executrix of James Black was exhibited in 1804, property to a considerable amount which had been returned in the inventory, was then the subject of litigation in an action of replevin. Nor does it appear by the testimony in the cause, that this action had been terminated until it was announced in the account of 1814.

It is true that this account has not the usual indications of a final account. It is not stated to be such, and further time appears to have been demanded by the executrix for the purpose of closing the estate. Yet, to every purpose, as concerns this question, the estate may be considered as closed, and the ascertainment of the deficiency as made; for all the property had been applied to the payment of debts, and was insufficient to discharge them. Nor could the representative of James Black in any account have lawfully claimed to intermeddle with any effects, of George Black, if such had existed, or, as such representative, have charged herself with them. Indeed, the record furnishes us with no intimation that there were other assets than such as were administered upon. But if they had existed, they would have been alone subject to the control of an administrator *de bonis non*. As the action then first accrued, when the deficiency was ascertained in 1814, the statute of limitations is no bar to this action.

It has been contended that a special request was necessary

to be proved before the right of action existed. But no special request is necessary in a case like this, where the debt becomes due on a contingency which is to happen after the execution of the contract.

Judgment affirmed.

LYLES v. DIGGES.

[6 HARRIS & JOHNSON, 364.]

THE RULE IN *SHELLEY'S CASE* is equally applicable to limitations in wills as in deeds.

THE WORD "ISSUE" in a will is sometimes a word of limitation and sometimes of purchase, depending on the context.

APPEAL from a *pro forma* judgment of the county court in an action of ejectment. The opinion states the case.

Magruder and F. S. Kay, for the appellant.

Jones, Taney, and Marshall, contra.

By Court, BUCHANAN, C. J. This case depends upon the construction of the will of Charles Digges, dated the twenty-eighth of January, 1742, which *inter alia*, has the following devise: "Item, I give and bequeath all that my land or messuage with the appurtenances thereon I now dwell, called Warburton Manor, as also all that tract of land called Frankland, adjoining thereto, to my loving son, William Digges, to hold to him during his natural life; and from and after his decease, I give all the said messuage lands and tenements, to my dear grandson Charles Digges, eldest son of the said William Digges, and from and after the decease of my said grandson Charles, then to remain to the first son of my said grandson, and the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth and fifth, and all and every other sons of my said grandson Charles, to be lawfully begotten, the elder of such son or sons, and the heirs of his body lawfully issuing, always to be preferred, and to take before the younger of such sons, and the heirs of his body, and for default of such issue, then I give the same to my grandson Thomas, second son of the said William Digges, for and during the term of his natural life, and after his decease, to remain to his issue in tail, in such manner as I have limited the same to my grandson Charles and his issue; and for default of such issue, then to remain to my grandson George, third son of the said William Digges, for and during the term

of his natural life, and after his decease, to be and remain to his issue in tail, in the same manner as before limited, for the use of my grandson Charles; and for default of such issue then to remain to my own right heirs for ever." And the question is, whether Thomas Digges took an estate for life only, or an estate tail. In the exposition of wills, it is a general rule, that the intention of a testator expressed in his will, shall prevail, if consistent with the settled rules of law.

For the appellant it is contended that the devise to Thomas Digges, etc., is within the rule laid down by *Shelley's case*, "that where the ancestor takes an estate of freehold by any gift or conveyance, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word heirs, is a word of limitation of the estate and not a word of purchase, which as a well known and established rule of law controls and governs it, and that he took an estate tail.

The first inquiry to be made is, how the devise to Thomas Digges should be construed in relation to the previous devise to Charles Digges? that is, whether it is to be taken as an entirely unconnected disposition, to be construed alone, without reference to any other, the words to "remain to his issue in tail," denoting not only the estate intended to be passed, but the manner, also, in which it should pass; and the subsequent words, "in such manner as I have limited the same to my grandson Charles and his issue," as explanatory only of the previous limitations to Charles and his heirs. And it seems to be perfectly clear that the latter words were introduced by way of reference to the limitation to Charles Digges, and his sons; for the meaning of the testator, in the use of the words, "to remain to his issue in tail," after the limitation to Thomas Digges for life, and construed, as it should be, with that reference, the whole clause must be understood, as if in the place of the words, "his issue in tail," the words of the preceding limitations to Charles Digges, and his first and other sons, etc., were particularly repeated, which is at variance with no known principles of construction. On the contrary, it is a rule in the interpretation of wills that the whole of the instrument shall be taken and examined together, in order to arrive at the intention of the testator, which shall prevail if there be apt words to effectuate it; and it is settled that even the technical word "heirs," may, by reference to a preceding distinct limitation, be qualified and restrained to mean "sons." The words, "in

such manner as I have limited the same to my grandson Charles, and his issue," are manifestly words of relation, and mean "to the first son of Thomas," etc., and so on, as in the words of the limitations, to the first and other sons of Charles, the word "issue," there used, being, by reference, synonymous to sons; and whatever estate Charles Digges took, whether in tail, or for life only, the same estate was given to Thomas. What estate, then, did Charles Digges take under the will of his grandfather? Admitting the rule in *Shelley's case*, though in terms applied to conveyances by deed, to be equally applicable to limitations in wills, as it certainly is, it remains to be seen whether this case is within that rule.

To bring it within the rule the word "issue," "for default of such issue," is resorted to to explain the sense in which the word "son" is used, as a word of more extensive signification, and is relied upon as being synonymous to the word heirs. That word, in the place where it is first found, immediately following the limitation to the first son of Charles Digges, and the heirs of his body, is used in relation to the heirs of the body of that son, and by force of the relative word such is to be understood to mean "heirs;" that is, the heirs of the body of the first son of Charles, which surely can have no effect upon the sense in which the words "first son" are used. Or if it should be construed to relate to the first son of Charles as well as to the heirs of the body of such first son, still it would be restrained by the same relative term "such" to mean "son." And the same words afterwards used and explained by the accompanying word "such" relates to and is restrained to mean the first and other sons of Charles Digges, and the heirs of the bodies of such sons respectively; but if it were not so, it by no means follows that the word "issue" would have the effect to bring this case within the rule in *Shelley's case*, being sometimes a word of limitation and sometimes of purchase, in a will, according to the context, and, to borrow the language of Mr. Fearne, "of less technical force" than the word "heirs," in the plural number, and is not *ex vi termini* within the rule.

It is not, however, our purpose to inquire minutely to what cases the rule is or is not applicable, that would lead to an almost endless examination, but briefly whether this particular case is within it. And in order to arrive at a correct conclusion it would seem to be only necessary to look to the leading principle of the rule; which is, that the limitation must not be to an individual or individuals of the family of the person to

whom the life estate is given, as a son, sons or children, but must be to his heirs, general or special, and so extend to and comprise the whole line of described heirs, as a class or denomination of persons to take in succession, as that the person who takes after the tenant for life, whoever he may be, must be one who indiscriminately answers the relative description of heir general or special, as the case may be, of the ancestor referred to, and takes *eo nomine*, or technically in that character only; and that there must be nothing in the limitation to restrain the operation of it to the person so first taking, or his representatives as such, but that it must reach to and equally comprehend all, other persons successively answering the same relative description, and entitle them to take under it *eo nomine*, and by virtue only of such relation to the ancestor: *Doe v. Colyear*, 14 East, 564; Preston on Estates, ch. 3; Fearne on Remainders, sec. 5. As in the particular case of Shelley, where the limitation was "to Edward Shelley for the term of his life, without impeachment of waste; and after his decease to the use of Mr. Caril and others, for twenty-four years; and after the said twenty-four years ended, then to the use of the heirs male of the body of the said Edward Shelley lawfully begotten, and of the heirs male of the body of such heirs male lawfully begotten, and for default," etc.

There the limitation to the use of the heirs male of the body of Edward Shelley, lawfully begotten, not being confined to one or more persons, in whom the character of heirs should first be fulfilled, but embracing all possible heirs of the given description, as a class of persons to take successively and in that character only. Edward Shelley was held to take an estate tail; notwithstanding the superadded words of limitation "to the heirs male of the body of such heirs male lawfully begotten," etc., they being of the same import with the preceding words of limitation, and virtually included in them, and not inconsistent with the nature of the descent pointed out by them. But if they had provided a different order of succession from that described by the first limitation "to the use of the heirs male of the body of Edward Shelley, lawfully begotten," and could not have been construed to mean the heirs in succession of the first named heirs, as heirs of Edward Shelley, then Edward Shelley would have taken an estate for life only. As in the case put by Anderson in *Shelley's case* of a limitation to the use of A. for life, remainder to the use of his heirs and of their heirs female, the superadded words of limitation, "and

of their heirs female," denoting a different species of heirs from that described by the preceding words "his heirs," the one being a limitation in fee-simple, and the other in tail female; the superadded words of limitation in such a case, manifesting the intention of the testator that the first taker should only have an estate for life, and that the words "his heirs," were only used to designate those who should form the root of a new inheritance.

Where there is a limitation to an individual or individuals of the family of the first taker, as to a son, sons or children, with superadded words of limitation to his or their heirs in fee or in tail, such selection being a manifestation of the testator's intention to constitute the person or persons selected, a stock from which the inheritance shall be deduced, there can be no doubt that the ancestor referred to will take an estate for life only, notwithstanding the person or persons so selected may also fill the character of heir or heirs to such ancestor; as in the case of a limitation in strict settlement on first and other sons. In *Lisle v. Grey*, Sir T. Raym. 278; *Fearne on Rem.* 151, the covenantor covenanted to stand seized to the use of himself for life, and after his decease to the use of E., his son, for life; and after his decease, to the use of the first son of the body of E., and the heirs male of the body of such first son; and for default of such issue, to the use of the second son of the body of E., and the heirs male of the body of such second son; and for default of such issue, to the use of the third son of body of E., and the heirs male of such third son; and for default of such issue to the use of the fourth son of the body of E., and the heirs male of the body of such fourth son; and so severally and respectively to every of the heirs male of the body of the said E., and the heirs male of the bodies of such heirs male, according to their ages and seniorities; and for default of such issue, remainder, etc., and it was held that the words "and so," etc., were words of relation, and meant in the same manner as the first four sons took and that E. took only an estate for life, and the general import of the word heirs being qualified by the preceding particular limitations to the first and other sons. And thus construed, it stood as if it had been in terms a limitation to E. for life, remainder to his first, second and other sons, and the heirs male of the bodies of such sons respectively.

In *Lowe v. Davies*, 2 Ld. Raym. 1561, the devise was "to B. and his heirs lawfully to be begotten; that is to say, to his first, second and third, and every other son and sons successively,

lawfully to be begotten of the body of said B., and the heirs of the body of such first, second, third, and every other son and sons successively, lawfully issuing, as they should be in seniority of age and priority of birth, the eldest always, and the heirs of his body, to be preferred before the youngest and the heirs of his body; and in default of such issue then over," etc. In that case, the words "his heirs" were considered as being explained by the words "that is to say," to mean first, second, and other sons, etc. And it was decided that B. took only an estate for life, that being the manifest intention of the testator. In *Sweet v. Herring*, 11 East, 264, the devise was to Margaret Davies for life, and after her decease to the heirs of her body, to be begotten severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body lawfully issuing, being always preferred, and to take before the younger of such son and sons, and the heirs male of his and their bodies; and for want and in default of such issue, then over," etc. There it was held that "heirs of her body" were not used in their strict technical sense as words of limitation, but were explained and qualified by the subsequent words, "the elder of such sons," by which they were plainly designated by the deviser as purchasers to take in their own right, and not by descent from their mother; and thus explained, the whole cause was viewed as if it had been a devise to her for life, and after her decease to her first and other sons successively in tail male.

Now, what is this case? Why a devise of Charles Digges, and after his decease to his first, second and third sons in succession, and the heirs of their bodies respectively, in no respect differing in principle from either of the cases cited. In each of those cases, to be sure, the word "heirs" is used, which, if unexplained by the context, would have been a word of limitation, and have operated to give to the first taker an estate-tail; but here is not that word, and this case is clear even of that difficulty, and which was the only difficulty raised in either of them. The case of *Bamfield v. Popham*, 1 P. Wms. 54, is directly in point. But here the words, "for default of such issue," are relied upon as controlling the sense in which the word "son" is used, and explaining it to mean "issue." I have endeavored to show that they have no such operation, and it will be seen that in *Lisle v. Grey*, and *Sweet v. Herring*, the very same words are used, though no such effect was attempted

to be ascribed to them. But if the word "son" was not in this devise, and in the place of it, the word "issue" had, in fact, been used, it would have made no difference.

In *Backhouse v. Wells*, 1 Cas. Eq. Abr. 184, pl. 27, the devise was to one for life, and after his decease, to the issue male of his body, and to the heirs male of the bodies of such issue, and the first taker was held to have only an estate for life, the word "issue" not being *ex vi termini* a word of limitation, and the words of limitation grafted upon it, as in this case, showing that it was used as a word of purchase, and as descriptive of the person who was to take the estate-tail. In the case of *Check v. Day*, 2 Roll. Ab. 417, where the devise was to a woman for life, and after her death to her heir, and the heirs of such heir, it was held that she took only an estate for life. And so in *Archer's case*, 1 Co. 63, where the limitation was to one for life, and after his death to his next heir male, and the heirs male of the body of such next heir male. In both of these cases, the word "heir" being used in the singular number, the superadded words of limitation restrained it to a word of purchase, which is stronger than the case of a limitation to one, and after his death to his "issue" and the heirs of such "issue." The case of *Legate v. Sewell*, 1 P. Wms. 87; 1 Cas. Eq. Abr. 395, has been urged to show that sons taking by seniority, and in succession, may still take as heirs, but that case will be found to have no bearing on this. There the devise was "to William Legate for life, and after his decease to the heirs male of his body lawfully to be begotten, and the heirs male of the body of every such heir male severally and successively, there was nothing explanatory of the words "heirs male of the body," and showing that the testator used them in any other than their technical sense; whereas, in this case, the limitation is to the first son, etc., and the word "heirs" was never used. And in *Lisle v. Grey*, *Love v. Davies*, and *Sweet v. Herring*, the sense in which the word "heirs" is used, is explained by the context, which shows the meaning annexed to it by the testator himself, and that he used it in the same sense as first, etc., sons. What has been said of the case of *Legate v. Sewell*, may equally be said of the case of *Jones v. Morgan*, 1 Br. Ch. 206, Fearn, 134, which was also relied on in argument. And the cases of *Langley v. Baldwin*, 1 Cas. Eq. Abr. 185; and *The Attorney-General v. Sutton*, 1 P. Wms. 754, are not more applicable. In each of those cases, after a limitation to some only of the sons of the first taker successively in tail, there is a remainder over, on the death of

the first taker without issue male of his body, which of itself was held to give him an estate-tail. In *Robinson v. Robinson*, 1 Burr, 38; and *Dodson v. Grew*, 2 Wils. 324, it was held to be an estate-tail in the first taker, in order to give effect to the manifest, general and more weighty intention of the testator, which could not stand with the particular intention, and must have sacrificed, if the minor particular intention had been gratified. And they were not decided on the ground that they were within the rule in *Shelley's case*, but on the *cy-pres* doctrine, which has been carried quite far enough in another country. Here there is no general intention to be sacrificed at the shrine of a particular intent, and this case is clear of the principle governing that class of cases.

It was manifestly the intention of the testator to give to his grandson Charles Digges, an estate for life, and no more. He begins with giving an estate for life to his son, William Digges, the father of Charles; he next gives an estate for life to Charles, his grandson; and then goes on to limit an estate to the first, second, etc., and all and every other son in succession, and the heirs of their bodies respectively. Now, if it was not his intention that the first and other sons of Charles should take the estate successively, each in his own right, as the root of a new inheritance, and that Charles should take only an estate for life, why did he not follow the devise to William Digges for life, with a limitation to Charles, his son, in tail? This he has not done, and his avoiding to do it, clearly shows what his intention was. Besides, the limitation in tail, general to the first and other sons in succession of Charles Digges, is in exclusion of the daughters of Charles; whereas, if he took an estate-tail general it might eventually go to his daughters, if he had any, or persons belonging to the class of described heirs, which was not the intention of the testator. He meant to give Charles Digges only an estate for life, otherwise he would have grafted words of limitation on the devise to him, as he did immediately after on the limitation to his first son, etc., and that intention may be grafted without violating any positive rule of law.

That the words "to his issue in tail," in the devise to Thomas Digges, are controlled by the next following words, "in such manner as I have limited the same to my grandson Charles and his issue," are explained to mean, to the first son, etc., of Thomas, as in the limitation to Charles and his first and other sons, is a position fully sustained by the case of *Lisle v. Grey*, where the words "and so severally and respectively to every the

heirs male of the body of said E.," immediately after the limitations to the first, second, third and fourth sons of the said E., and the heirs male of their bodies respectively, were held to be words of relation, and meant in the same manner as the four first sons took, the words "and so" being the same as *eodem modo*. We are, therefore, of opinion that Thomas Digges took only an estate for life in the premises devised to him.

Judgment affirmed.

Cited in *Shreve v. Shreve*, 43 Md. 399, and among other cases, in *Fulton v. Harman*, 44 Id. 264, in support of the position, that when the word heirs is taken as a word of limitation it is collective, and signifies all the descendants in all generations; but when it is taken as a word of purchase it may denote particular persons answering the description at a particular time and in a special sense, according to circumstances.

ALLEGRE v. MARYLAND INSURANCE COMPANY.

[5 HARRIS & JOHNSON, 408.]

USAGES OF TRADE ARE ADMISSIBLE in evidence to explain the meaning of expressions contained in policies of insurance, charter-parties, or instruments of like nature, whether such usages regard the course of the voyage or not.

PROOF OF LOSS.—Where a policy of insurance stipulated for the payment of loss, in ninety days after proof and adjustment thereof, to support an action for loss, such proof must first be exhibited to the underwriters, and should be made by the protest, bill of lading and invoice, or such other equivalent proof as the nature of the loss admits of.

TO ADJUST THE MEASURE OF THE INDEMNITY in case of a partial loss, where the cargo is a mixed one, proof of the actual value at the port of purchase must be produced.

REFUSING TO PAY A LOSS without stating that the reason therefor is the want of the preliminary proof called for by the policy, will amount to a waiver of such proof.

THE ASSURED'S RIGHT OF ACTION ACCRUES immediately upon the refusal to pay the loss, notwithstanding the policy states that payment is not to be made until ninety days after proof and adjustment of loss; and that, in case of dispute, the same should be settled by arbitrators.

AN AGREEMENT TO ARBITRATE does not oust courts of their jurisdiction.

THE DISCRETIONARY POWERS OF COURTS of law are confined within fixed and well-established limits, and are to be exercised to further, not prevent, the administration of public justice. Principle applied to the order of a court directing the plaintiff to submit to a nonsuit, or to a verdict for the defendants.

APPEAL from the county court. Covenant on a policy of insurance; plea, *non infregit conventionem*. The facts appear from the opinion. The plaintiff below prosecuted the appeal.

Mayer, J. Glenn and Tuney, for the appellant.

Lloyd and Wirt, Attorney-general for the United States, contra.

By Court, DORSKY, J. The counsel on both sides, in the argument of this cause, have displayed great professional ability and much labor of research; and the deep interest which the commercial part of our community take in subjects of this nature, have induced the court to give the matters in controversy their most serious consideration. In the progress of the trial, in Baltimore county court, three bills of exceptions were taken by the counsel for the plaintiff, the first of which presented the following statement of facts on his part: "That on the twenty-third of May, 1820, he obtained insurance on the cargo of the brig Eugene, from Rio de la Plata to Havana, valued at six thousand dollars; the policy of which being, for the most part, in the usual form, contained the following clause: 'And in case of loss, such loss to be paid in ninety days after proof and adjustment thereof, the amount of the note given for the premium, if unpaid, being first deducted; and it is mutually agreed, that if any dispute shall arise relating to a loss on this policy, it shall be referred to two persons, the one to be chosen by the assured, the other by the Maryland insurance company, which two persons shall have power to adjust the same; but in case they cannot agree, then those two persons shall choose a third, and any two of them agreeing, their determination shall be obligatory on both parties.'" That on the eighth of July following, the cargo, consisting of one hundred and six mules and four jackasses, was laden on board, the brig being then staunch and safe, and whilst on the voyage, by one of the perils insured against by the policy, all the mules, save twelve, were lost. That the protest was made in due form, sworn to by the captain and three of the crew, detailing minutely all the particulars of the shipment of the cargo on board the brig, her sailing on the voyage and the loss sustained as aforesaid. That this protest, together with the usual bill of lading, were delivered to the defendants by the plaintiff as his preliminary proofs, before the bringing of this action. Sometime after the receipt whereof by the defendants, they caused the following letter to be written to the plaintiff:

"Mr. J. B. Allegre: Sir—I am instructed by the directors of this company, to inform you that the claim you make for the insurance on the cargo of the brig Eugene, has had their particular attention and also that of Mr. Pinkney and Mr. Pur-

viance, the result of which is that the company declines the payment, under a persuasion, sanctioned by those gentlemen, that the company are not answerable for the same. Very respectfully, etc., John Hollins, President."

That after this testimony had been given, the defendants offered to prove that it was the "uniform and established usage for a vessel sailing from the port of shipment, to have on board a bill of lading, and invoice of cargo, showing its prime cost and value, and that such invoice is a document which the insurer is in the habit of demanding, and the assured of producing, on the settlement of all partial losses, although such losses may be claimed under a valued policy;" to the admission of which proof the plaintiff's counsel objected; but the court overruled the objection, and permitted the testimony to be given, to which opinion the plaintiff excepted. In this case the plaintiff, having omitted to abandon and claim for a total loss, brought the present action of covenant to recover for a partial loss. Is there error in permitting this usage to be proved, to explain the meaning of the words "proof of loss and adjustment thereof?" is the question arising on this bill of exceptions. It has been conceded throughout the argument that usages of trade are admissible in evidence to explain the meaning of expressions contained in policies of insurance, charter-parties or instruments of like nature. But it was contended that such proof could only be received of usages, which relate exclusively to the course of the voyage. In support of this assumed distinction, no decision has been adduced, not even an *obiter dictum*, nor have any reasons been submitted to show why the terms of a policy of insurance may not be as well explained by any other commercial usage as by usages of trade, applicable only to the course of the voyage. For solemn adjudications to the contrary see the cases of *Cutter v. Powell*, 6 T. R. 320; *Mason v. Skurray*, 1 Marsh. Ins. 226; and *Gibson v. Colt and others*, 7 Johns. 385. In none of these cases were the usages proved, as explanatory of the terms of the contract, usages of trade which related to the course of the voyage.

The second bill of exceptions contains the facts proved by the plaintiff and the proof on the part of the defendants of the usage mentioned in the first bill of exceptions; which usage was proved by David Winchester, president of the Baltimore Insurance company, and well acquainted with the mode of adjusting losses on policies of insurance. Whereupon the plaintiff, by his counsel, prayed the court to instruct the jury that no proof is

required on this trial that he exhibited to the defendants, before instituting this suit, any preliminary proofs, or that if such proofs be necessary the protest and bill of lading are sufficient preliminary proofs, or that said letter from the defendants was a waiver of such proofs, which direction the court refused to give; and to such refusal the plaintiff excepted. It is a rule of law that in construing written instruments the court should give some meaning and operation to every clause and word of the instrument, provided it can be done consistently with the intentions of the parties. Let this rule be applied to the first branch of this exception, viz.: Is it necessary on a trial at law on such a policy as the present, for the assured to prove that he exhibited any preliminary proofs to the insurer before he commenced his action for indemnity for a partial loss? It appears somewhat a matter of surprise that the human mind could be prevailed upon to doubt on this subject. In support of the affirmative of this proposition, the language of the policy is so explicit, the intentions of the parties so obvious, that it almost becomes a self-evident proposition. By sanctioning the negative, you reject, as inoperative and superfluous, all that is said about "proof of loss," contrary to every known principle of construction.

The second branch of this exception, viz.: "Was the exhibition to the insurer of the protest and bill of lading sufficient preliminary proofs," is a question, the answer to which is by no means so obvious. There is not that perspicuity and precision in the language used, which silence all doubt as to the meaning of the parties. The requisition of "proof of loss" is distinct and undeniable, but the obligation of the assured, to furnish the customary proofs of interest and the quantum of loss, which forms the basis of an adjustment, is certainly not so apparent. But when we advert to the nature and circumstances of the contract itself, the manifest design of the parties, in introducing this clause, that all adjustment of losses should be made by themselves, the sedulous precaution with which they have endeavored to provide against all litigation, by declaring that if they cannot adjust the loss among themselves, that arbitrators shall be chosen for that purpose; that in no event, within the contemplation of the parties, was the assured to be authorized to sue at law. The court think that the true construction of this clause of the policy is that the insured is bound to offer, as his preliminary proofs, such documentary proofs in his possession as are usually required in adjusting a partial loss; that is,

the protest, bill of lading and invoice, or such equivalent proofs as the nature of the case is susceptible of. These proofs remain with the assured only, or his agents; the burden of producing them, therefore, rests on him.

The court forbear to express any opinion on the question so warmly contested in the argument, "whether in the case of a partial loss on the cargo in a valued policy, the insured is to be indemnified according to the valuation in the policy, or the actual value of the cargo, at the port of shipment." Let the question be settled as it may, if the cargo be a mixed one, proof of its actual value at the port of purchase, must be produced before an adjustment upon either principle can be made. "Was the letter of the defendants to the plaintiff a waiver of such preliminary proofs?" is the last question arising on this exception, and the court are of opinion that it was. Good faith and fair dealing are of the very essence of all contracts of insurance, and should pervade every proceeding under them. If, then, the insurer, in writing this letter, intended to reject the claim of the insured, merely, because the invoice had not been produced, the writing of this letter was a fraud upon the assured, a deception utterly inconsistent with the spirit and meaning of the contract; a species of conduct which this court will never impute to the underwriters, while their acts are susceptible of a different interpretation. If they intended to refuse payment of the loss, because the invoice, a customary part of the preliminary proofs, had not been laid before them, it was their duty so to have informed the insured; and their failure to do so, and the writing of such a letter, was a waiver of all further preliminary proofs. The letter itself is a plain, unequivocal notification to the plaintiff, that his claim for indemnity will not be adjusted by the defendants, and by necessary implication gives him to understand that all further offers of preliminary proofs would be useless.

The agreement to arbitrate does not oust courts of justice of their jurisdiction. The parties then stand in an attitude not contemplated by them. Their stipulation that the loss is only to be paid in ninety days after proof of loss and adjustment, looks only to the case of an amicable adjustment by themselves. When, then, by the acts of the defendants that cannot be made, the plaintiff is absolved from the operation of this stipulation, and his right of action immediately accrues. His case comes completely within the principle settled in the case of *Ogden v. The Columbia Insurance Company*, 10 Johns. 273, where, under

a proviso in the policy that the assured should not abandon until six months after capture and detention, the condemnation taking place in one month after capture, the court determined that the right to abandon was immediate upon the condemnation, a new case having arisen not contemplated by the parties in their contract.

The third bill of exceptions presents a new point to the consideration of the court, not involving any question as to the merits of the matters in controversy between the parties in the cause. The bill of exceptions states that after the plaintiff had given his evidence, as stated in the first bill of exceptions, and having declared his intention to relinquish the claim for a total loss, and to claim in this action for a partial loss, the defendants, by their counsel, prayed the court to instruct the jury that according to the covenants contained in the policy, in order to maintain the present action, the plaintiff was bound to prove that previous to the institution of this suit, he had exhibited to the defendants, among the preliminary proofs of loss, and for the purpose of adjustment, the invoice showing the prime cost of the cargo, for the loss of which he was now claiming; the defendant's counsel insisting in argument, that in a case like this, it was the constant usage of insurance companies, among such preliminary proofs, to require the production of such invoice, and of the insured to produce it, which usage was not denied by the plaintiff's counsel in argument, and by not being denied, was supposed by the court and the defendant's counsel to be admitted; the court accordingly instructed the jury that it was incumbent on the plaintiff to show that among the preliminary proofs he had exhibited the said invoice of cargo, and unless he should prove this fact, he would not support the present action. To this instruction the plaintiff, by his counsel, declared that he would except, and proceeded to draw his bill of exceptions; while engaged in drawing it, the plaintiff's counsel were asked by the court whether it was their intention to go on with the cause, or whether this instruction would put an end to it? To which the counsel answered that it was not their intention to go on with the cause; whereupon the court, with the concurrence of the counsel on both sides, openly discharged the witnesses who were in attendance on the part of the defendants, and plaintiff also; the witnesses being discharged and having left the court-house, but the jury remaining undischarged in their box, the plaintiff's counsel denied the usage before stated, and refused to have it inserted in the

bill of exceptions; whereupon the defendant's counsel, for the purpose of satisfying the plaintiff's counsel and the court, that it ought to be inserted in the bill of exceptions, sent for David Winchester, a resident of the city of Baltimore, and one of the witnesses who had been so as aforesaid discharged, but who had been previously summoned for the purpose of giving evidence in the cause, who did expressly prove the usage as above stated; after which the plaintiff's counsel offered to proceed with the cause, and to adduce evidence that the said invoice had been exhibited to the underwriters among the preliminary proofs, to wit, on the twenty-third of May, in the year 1820; but the court, under the circumstances of the case, refused to permit the cause to proceed, and put it to the counsel for the plaintiff either to submit to a nonsuit, or to a verdict for the defendants, from which opinion of the court the plaintiff excepted.

Had the facts been inserted in this bill of exceptions, which actually occurred in the court below, as stated by the defendants' counsel in the argument of this case, the conduct of that court might have appeared free from all error or ground of exception. But this court must form their opinion upon the facts, as stated in the record, and cannot look beyond it. In this case, then, as thus presented to their consideration, the court think there is error in the proceedings of the court below. The discretionary powers of courts of law are confined within fixed and well established limits, and are to be exercised to further, and not to prevent, the administration of public justice. The county court had not a right of their own mere motion, (and no other motive for their conduct here appears), to refuse permission to the plaintiff to proceed in the trial of his cause; the right to such objection belonging to the defendants, and not the court. In the exercise of this right, the defendant must state the grounds of their objection; of the sufficiency of which the court are to judge. If they had alleged the absence of their witnesses, occasioned by the proceedings which had taken place, they must have stated what they expected to prove by them, that the plaintiff, if he sees fit, may admit the facts and proceed with the trial; and should he refuse to make the admission, it would then become the duty of the court to put him to his election, either to consent to withdraw a juror, take a verdict against him, or nonsuit his case.

The court concur with the opinion of the county court on the first bill of exceptions and on the two first divisions of the sec-

and bill of exceptions, but they dissent from their opinion on the last alternative of the second bill of exceptions, and from the opinion given on the third exceptions.

Let the judgment, therefore, be reversed, and a *procedendo* awarded.

Judgment reversed, and *procedendo* awarded.

AN AGREEMENT TO SUBMIT TO ARBITRATION, matters in dispute between the parties, cannot oust the courts of their jurisdiction: 2 Parsons on Mar. Ins. 483; May on Ins., sec. 492. The cases in which this question has most frequently arisen, are those on policies of insurance, wherein is, usually, a clause of agreement to refer to arbitration before an action on the policy shall be commenced. In *Trott v. The City Ins. Co.*, 1 Clifford, 443, by the terms of the policy, the by-laws of the company were made a part of the contract of insurance. One of the by-laws provided for a submission to arbitration before suit should be brought to recover for a loss sustained. The validity of this by-law came directly before the court. Judge Clifford said: "Mr. Chitty adopts the rule laid down in *Kill v. Hollister*, 1 Wils. 129, that a clause in an agreement, that if any dispute should arise, the matter in difference should be referred to arbitration, is no defense to an action: Chit. on Cont. 792. Lord Kenyon said, in *Thompson v. Charnock*, 8 T. R. 140, it is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference, to arbitration, is not sufficient to oust the courts of law or equity of their jurisdiction, and with the qualification admitted in *Goldstone v. Osborne*, 2 C. & P. 550, the decisions in the English courts have been uniform, to the same effect, until within a very recent period: *Tattersall v. Groot*, 2 Bos. & P. 131; *Mitchell v. Harris*, 2 Ves. jun. 129; *Street v. Rigby*, 6 Id. 815; *Wellington v. Mackintosh*, 2 Atk. 569; *Gourlay v. Duke of Somerset*, 19 Ves. jun.; *Milne v. Gratrix*, 7 East, 607; *Clapham v. Higham*, 1 Bing. 87; *King v. Joseph*, 5 Taunt. 452. Similar views have also been held by the state courts in this country, in repeated instances: *Robinson v. Georges Ins. Co.*, 17 Me. 131; *Gray v. Wilson*, 4 Watts, 39; *Hill v. Moore*, 40 Me. 515; *Allegre v. Maryland Ins. Co.*, 6 Harris & J. 408; *Contee v. Dawson*, 2 Bland, 264; *Haggart v. Morgan*, 4 Sand. S. C. 198; Same Case, 1 Seld. 422; *Nute v. Hamilton Ins. Co.*, 6 Gray, 174; *Hall v. People's M. F. Ins. Co.*, Id. 185; *Cobb v. N. E. M. M. Ins. Co.*, Id. 193; *Amesbury v. Bowditch Ins. Co.*, Id. 596. Text writers, both English and American, have long regarded it as a settled principle of law, that the parties to a contract cannot oust the jurisdiction of the courts by any agreement to submit the matter in difference to arbitration: 2 Arnould on Ins. 1245; 2 Story's Eq. Juris., sec. 1457; 2 Parsons's Mar. Law, 483."

In *Wood v. Humphrey*, 114 Mass. 185, Colt, J., says: "It has been long settled that agreements to arbitrate, which entirely oust the courts of jurisdiction, will not be supported either at law or in equity; although it is said that those which do not go to the root of the action, but are only preliminary thereto, or in aid thereof; such as respect the mode of settling the amount of damages, or the time of paying it, or the like, will be sustained." Citing, among other cases, *Scott v. Avery*, 5 H. L. Cas. 811; and *Rowe v. Williams*, 97 Mass. 163. The agreement to refer to arbitration was set up as a defense to the action in *Wood v. Humphrey*, and the agreement held void. And upon this precise point that decision was relied on in *Pearl v. Harris*, 121

Mass. 330. Laying down the same principle are: *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478; *Lauman v. Young*, 31 Id. 306; *Insurance Co. v. Morse*, 20 Wall. 445; *Liverpool etc. Ins. Co. v. Creighton*, 51 Ga. 95. The distinction between a general and special submission adverted to in *Wood v. Humphrey*, *supra*, in speaking of agreements to refer matters in dispute to arbitration before an action in relation thereto can be brought, is recognized in several of the decisions. Where the agreement does not go to "the root of the action," but is merely for a submission to arbitrators, in order to determine the amount to be paid, or manner and time of payment, the making of such submission a condition precedent to harassing a party with an action at law has been considered not to oust courts of justice of their jurisdiction. The distinction is made in *May on Ins.*, sec. 493; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478; *Liverpool etc. Ins. Co. v. Creighton*, 51 Ga. 95. And in the Exchequer Division of the Court of Appeals, vol. 1, p. 257, in *Dawson v. Fitzgerald*, where Lord Coleridge, C. J., in the course of his opinion, which was also that of the other members of the court, said: "The correct view of *Scott v. Avery*, 5 H. L. Cas. 811, is well stated in my brother Bramwell's judgment in *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 245, to be this: 'If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises, to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary, would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain, common sense, and is what I understand the house of lords to have decided in *Scott v. Avery*.'" The elaborately considered case of *Edwards v. The Aberayron Mutual Ins. Society*, L. R. 1 Q. B. 563, discusses at large the doctrines of the English decisions, and deduces therefrom a rule, which observes the distinction above noticed.

The principal case is cited in *Citizens' F. Ins. Co. v. Doll*, 35 Md. 101, in support of the proposition that if the refusal to pay the loss on a policy of insurance, or to acknowledge liability, by the assurers, be placed on other and distinct grounds than the insufficient and defective proof furnished, a waiver of such proof will be implied.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LINDELL *v.* LIGGETT.

[1 MISSOURI, 432.]

RES JUDICATA.—A judgment against a plaintiff in an action on an account stated, is no bar to a subsequent action of assumpsit on a promissory note, although the plaintiff sought to put the note in evidence in the former action, where it was excluded by the court.

ERROR to the circuit court. The opinion states the case.

By the Court, **McGILL**, C. J. The firm of Sanguinet & Bright drew two promissory notes in favor of the firm of Neal & Liggett, who indorsed them to Lindell, for the accommodation of Sanguinet & Bright, there being no debt due from Neal & Liggett to Lindell, and no consideration moving from Lindell to Neal & Liggett; when these notes became due, one of them was presented to Sanguinet & Bright, and payment being refused, was protested, and notice given to Neal & Liggett, the indorsers. Lindell brought his action of assumpsit against Liggett, surviving partner, containing special counts on the notes, and concluded with the common count, on an account stated.

The defendant pleaded non-assumpsit and payment. On the trial the counts on the notes were stricken out, and the trial proceeded on the third count, upon an account stated. The plaintiff produced his notes, proved the execution of them, and the indorsements, but failed to prove that the notes, when due, were presented to the makers for payment. And for want of that proof, the court decided that the plaintiff could not recover; and there was a verdict and judgment against him on both issues. The plaintiff brought a second suit, declaring specially on the notes, as indorsed notes, and on the trial proved his

case as first above-stated; the defendant having pleaded non-assumpsit, and a former judgment in bar of the same promises and undertakings, he produced the former record and facts, as to the first trial. The court gave judgment for the defendant. The point to be decided is, was the first judgment a bar to the recovery in the second.

The rule of law is, that no man can be twice vexed for the same cause. The inquiry must be to ascertain what was the first cause of action. The first recovery was had on an account stated. In order to support this count by evidence, it must appear that the parties did account together; and that a balance was found to be due from one to the other. Proof of this would be direct proof; but in the absence of this, the law allows of presumptive proof. The point to be proved here was that they accounted together. Lindell offered these notes to prove that; but they, so far from proving that fact to exist, proved, in connection with some other evidence, that the fact was utterly untrue; and it is said, because this evidence was offered, the bar must go to the evidence, and not to the fact that they accounted together.

At first we had some difficulty in the case, but now the question is clear enough. Suppose a person would declare on a special agreement in assumpsit, and on the trial would prove a special agreement, but different from the one declared on, and he should suffer a verdict against him; would any one contend he could not again proceed on the case, as proved on the former trial? Yet, in that case, the reason why he failed, would be that the evidence went too far. In that case, the evidence went too far, and showed the party could not recover on that count. And again, suppose the plaintiff should declare on a specialty, and it should become necessary to produce it on the trial, and when produced, it should vary from the declaration, and for that reason, the verdict should be against him; would any one contend he could never afterwards use it, because he attempted to use it for a purpose in which it would not bear him out?

The case at bar is like these cases; so much so that we perceive no material distinction; and one thing we do clearly perceive, which is that on these notes, there never has been a recovery in bar.

Let the judgment be reversed with costs.

HUNT v. MULLANPHY.

[1 MISSOURI, 508.]

FIXTURES.—Things personal may become part of the realty: 1. By incorporating them therewith for permanent use; 2. By annexation for any object, in such a manner that they cannot be removed without dilapidation, or injury to the inheritance.

IDEM—**INTENT IN ANNEXING.**—When property, personal in its character, is claimed as a part of the freehold, the claimant must show such facts and circumstances as will clearly indicate that the owner intended to change the character of the property from personalty to realty.

IDEM—**RULE BETWEEN GRANTOR AND GRANTEE.**—The right of the grantee to things of a personal character must be established by showing that they were, in the deed, treated as real estate.

IDEM—**FOR TRADE.**—Annexations for the purpose of trade or manufactures, are of a personal character, and do not become a part of the realty.

A BOILER situate in a house on mortgaged premises, made of copper, and built into a furnace erected for that purpose, but capable of removal without injury to the building, is not a fixture and does not pass to the mortgagee.

ERROR to the circuit court. The opinion states the case.

By Court, PETTIBONE, J. This was an action of trover, brought by Mullanphy against Hunt, in the court below, for a stone slab and copper boiler. There was a special verdict found, on which a judgment was rendered in favor of the plaintiff for the boiler, and for the defendant as to the slab. To reverse the judgment in favor of the plaintiff, the defendant brings this writ of error. It is only necessary, therefore, to examine the case as it respects the boiler, and the only point to be considered is, whether it was a fixture. The facts set out in the special verdict are, in substance, as follows: That some time before the commencement of the suit in the court below, one Theodore Hunt was seised and possessed of a certain lot of ground in the town of St. Louis, whereon was a tannery and a currying-shop; and whereon were also sundry articles of personal property, called the stock of the said yard and shop; that before the commencement of the said suit, Theodore Hunt mortgaged the said lot to the plaintiff in the suit below; that after the mortgage, and before the commencement of the said suit, Theodore Hunt sold and delivered all the stock of the said yard and shop to the defendant; and also, that after the said sale, and before the commencement of the suit, the sheriff of St. Louis county, under an execution against the said Theodore Hunt, sold and by deed conveyed the said

lot to the said plaintiff in the suit below. The special verdict also finds that in a house standing on the said mortgaged premises, in the space between the chimney and the side wall of the said house, there stood the boiler in question, made of copper, built into a furnace erected for that purpose, with brick and mortar, so as to hide the said boiler, except the edge or mouth of the same; that from the furnace underneath the said boiler proceeded a flue, conducted along the side of the chimney and closed at the top; and that in the side of the chimney, and covered by the flue, was a hole pierced through the side of the chimney into the flue thereof, so as to permit the passage of the smoke; that the brick-work of the said furnace, and the flue thereof, were not interlaced with the brick-work of the said chimney, but was capable of being taken down without injuring the chimney any otherwise than by laying bare the hole of communication between the flue of the furnace and the flue of the chimney. The said verdict also finds that the defendant, while in possession of said premises, removed therefrom and converted to his own use the said boiler; that the said boiler was in the situation above described at the time of the execution of the said mortgage, and continued in the same situation for some time after the execution of the said deed from the sheriff above-mentioned. There is nothing in the verdict which shows with what intention, or for what purpose, the boiler was thus affixed in the said building. The case therefore presents the naked question whether property personal in its character, thus affixed, becomes *prima facie* a part of the realty, so as to pass by a deed of the land.

There can be no question but that a copper kettle, or boiler, abstractly considered, is of a personal character. It is, in its nature, movable, and may be used in any place where the wants or conveniences of the owner may require it, and the character of it is not changed by the manner in which the philosophy, economy or convenience of the owner may cause him, from time to time, to put it in use. It is, therefore, deemed altogether immaterial, as it respects its character as personal property, whether it is set in a furnace, suspended upon a crane, or standing upon its legs, unless there are other circumstances to connect it with the realty. Kettles set in a furnace, with "brick and mortar," for the purpose of making sugar at a sugar camp, as is often the case, would hardly be considered so attached to the soil as to pass by a deed of the land; but things, personal in their nature, may become a part of the

realty in two ways: 1. By incorporating them with the realty, as a part thereof, for some permanent object; 2. By affixing them to the realty, for any object, in such a manner that they cannot be severed, without dilapidation or injury to the inheritance.

As an example under the first head, the nail and plank which compose the door of a house, or the rails which compose a fence, are, before their appropriation to these particular objects, of a personal character, but by their application and by the intention of the owner, they become a part of the realty, and pass with the land, notwithstanding they might be severed from it without violence or dilapidation of the inheritance. So it is in the power of the owner to annex almost everything of a personal character to the soil, and make it a part of the realty; or, on the contrary, at his pleasure, to dis sever almost everything, and make it a part of the personality. But where property, which is personal in its nature, is claimed as belonging to the freehold, the party claiming it must show that its character has been changed by some facts or circumstances which will clearly prove the intention of the owner thus to change it. As between grantor and grantee, what will pass as real estate must depend altogether upon the intention of the parties, to be gathered from their deed. If the grantee claims anything which is, in its character, personal, he must show that it was differently considered in the deed. For instance, it is laid down in the books, and we conceive it to be good law, that annexations to the freehold for the purposes of trade and manufactures, are of a personal character. If, then, a lot were conveyed by a general description, as so much land, bounded in a particular manner, without saying anything further, the grantor would still be allowed to remove everything which might be dis severed without violence to the freehold, which had been placed there for the purpose of trade. But if the deed conveyed the land, together with the manufactory thereon, the evident intention of the parties would be that everything annexed to the freehold, which was necessary to carry on the manufactory, should pass, and would pass accordingly. In the present case, the deed was merely for a lot of land. But if it had been also for the tannery thereon, still there is nothing in the case which shows that the boiler in question was any way connected with the tannery, nor is there any other circumstance which shows that it was permanently annexed to the freehold, so as to be consid-

ered a part thereof. The bare fact of its being set in brick and mortar does not afford that presumption.

The only remaining point to be considered is, whether the boiler was so affixed to the premises that it could not be removed without violence or injury to the premises.

The special verdict finds that not only the boiler but the furnace and the flue might be removed, without any other injury to the building than laying bare a hole already existing in the chimney. This can be no dilapidation. Nothing is torn or taken from the building. The flue itself has not even been removed. The judgment of the circuit court, in favor of the plaintiff, must be reversed, and defendant must recover his costs in this court, and in the court below.

FIXTURES, WHAT ARE.—The doctrine in this case as to what constitutes a fixture was affirmed in *Burk v. Baxter*, 3 Mo. 207, where it was decided that stills set up in furnaces in the usual manner for making whisky are not fixtures, but personal property. And see *Kirwan v. Latour*, 2 Am. Dec. 519. A rule for determining whether or not a chattel is so annexed to the realty as to become part of it; is laid down by Bartley, C. J., in *Teaff v. Hewitt*, 1 Ohio St. 511, after a very careful and elaborate examination of the authorities. He says: "From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Appropriation to the use or purpose of that part of the realty with which it is connected; 3. The intention of the party making the annexation to make the article a permanent accession to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made. This criterion furnishes a test of general and uniform application; one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases, but it is believed to be at variance with the conclusion in but few of the well-considered adjudications."

By the application of this test in that case it was determined that carding and spinning machine power looms, etc., in a woolen factory, connected with the motive power by bands and straps, and fastened in their places by cleats nailed to the floor, were not fixtures. So in *Gale v. Ward*, 7 Am. Dec. 223, a leading case on this subject, it was determined that wool-carding machines which could not be removed from the building in which they were used, without being taken to pieces, were not fixtures. A similar conclusion was reached in *Cresson v. Stout*, 8 Am. Dec. 373, with reference to carding and spinning machines fastened to the floor by cleats and wooden pins. It was determined in *Rogers v. Crow*, 40 Mo. 91, that lamps, chandeliers, candelabra and gas fixtures, in a church, were not a part of the realty, but that an organ, fitted into a recess, left for that purpose, in the walls of the building, when it was

erected, and which could not be removed without destroying "the architectural design, finish and symmetry" of the edifice, was a fixture as between vendor and vendee. In *Lacey v. Giboney*, 36 Mo. 320, it was held that the machinery of a chair factory inclosed in a brick wall, and bolted to timbers planted in the ground, would not pass with the freehold as between vendor and vendee.

On the other hand, it was held in *Cohen v. Kyler*, 27 Mo. 122, that pipes for conducting water through the rooms in a dwelling-house were fixtures. And in *Philipson v. Mullanphy*, 1 Mo. 620, it was decided that where a lot and brewery thereon were sold, and afterwards leased to one of the vendors, a malt-mill being thereon at the time of the sale and lease, the rollers in the mill could not be removed by the tenant, although it could be done without injury to the brewery. The court thus distinguished that case from *Hunt v. Mullanphy*: "It is said this case is like the case of *Mullanphy v. Hunt*, decided at St. Charles. This is a mistake. In that case it did not appear for what purpose the kettle was put into the furnace; it might have been for the most temporary purpose. Besides, a kettle is a thing personal in its nature; but a rolling malt-mill is no more personal in its nature than any other form of mill. The mode of its operation does not make it any less a mill. It was most clearly not a movable mill, to be used anywhere and everywhere. These rollers performed the office of mill-stones. A mill-stone fixed up for grinding, cannot be taken by the executor: 3 Bac. 63. And why should the rollers that are substituted for them? As well might this man have taken the large wheel from which these rollers received motion, under the pretense that he originally made it, or that it could be removed without injuring the walls of the house. * * * Upon the whole of this case, we think it entirely unlike the case at St. Charles, of *Hunt v. Mullanphy*."

TENANT'S RIGHT TO REMOVE FIXTURES.—The law relating to this subject is discussed and the cases examined in the note to *Holmes v. Tremper*, 11 Am Dec. 241.

CHAMBERLAIN v. FARIS.

[1 MISSOURI, 517.]

JUDGMENT OF SISTER STATE.—No action can be sustained here on a judgment obtained in another state against a non-resident, by attachment without personal service of process on the defendant.

ERROR to the circuit court. The opinion states the case.

By Court, **TOMPKINS, J.** This is an action in a judgment obtained in Massachusetts by Chamberlain against the intestate, Smith, in his life-time. The defendant's administrators craved oyer of the record of the judgment declared on, and set it out. It then became a part of the record of this cause, and from this record so set out, it appears that the judgment obtained in Massachusetts was a judgment *in rem*; that is to say, no notice of the action was served on Smith, the defendant, but his property was attached, and this constructive notice is all that the

intestate had of the commencement of the action. Smith never appeared to the action, and there is a suggestion on the record that he was not a resident of that state, and the judgment by default is entered against him. The defendants, Faris and Tracy, demurred to the declaration, and judgment on the demurrer for the defendant was given in the circuit court of St. Louis county. To reverse this judgment, the plaintiff has come into this court, and relies on the constitution of the United States: See Act 4, sec. 1, and the laws of the United States passed in pursuance thereof, vol. 2, p. 102, Bioren's edition. It is unnecessary for the court to say what would be its opinion if authority had been produced to prove that such a judgment would have been received as evidence of debt in the courts of record of Massachusetts. But as such authority has not been produced, the court feels no hesitation in saying that the judgment of the circuit court was correct. The court considers the record of the proceedings in Massachusetts merely as a proceeding *in rem*, and that the judgment can effect nothing but the property attached; this probably was the only effect of such a judgment in Massachusetts.

The judgment of the circuit court is affirmed.

VALIDITY OF JUDGMENT OF SISTER STATE.—It is well settled that a personal judgment against a non-resident debtor, without personal service of the summons or notice, within the state, can have no force or validity in any other state: Freeman on Judgments, secs. 564 to 567, inclusive; *Bartlet v. Knight*, 2 Am. Dec. 36, and note; *Rogers v. Coleman*, 3 Id. 733; *Kilburn v. Woodworth*, 4 Id. 324; *Robinson v. Ward*, 5 Id. 327; *Bissell v. Briggs*, 6 Id. 88; *Borden v. Fitch*, 8 Id. 225; *Aldrich v. Kinney*, 10 Id. 151; *Andrews v. Montgomery*, Id. 213. Indeed, it seems now to be authoritatively determined that a judgment founded on mere constructive service on a non-resident has no validity even in the state in which it was rendered, except so far as it affects property brought within the jurisdiction of the court, pending the action, by an attachment: *Pennoyer v. Neff*, 95 U. S. 714.

ROCHEBLAVE v. POTTER.

[1 MISSOURI, 561.]

SALE—DELIVERY OF POSSESSION.—A sale of slaves of which the vendor thereafter continued in possession, is fraudulent and void as against a subsequent purchaser for value, in good faith and without notice.

ERROR to the circuit court. The opinion states the case.

By Court, WASH, J. This was an action of trover, brought by the defendant in error against the plaintiff in error, in which

Potter obtained judgment; to reverse which this writ of error is prosecuted. The facts, so far as they are deemed material to the decision of this cause, are found in a special verdict as follows: One Justis Terril, being the owner of the slave in the declaration mentioned, removed to Missouri, and settled in the county of St. Louis, in the year 1818, bringing along with him the slave in question, together with several others. That said Terril made a visit, in 1820, to the state of Louisiana, and there executed, on the fifteenth day of April of that year, a bill of sale to the defendant in error for the slave in question, together with others. That the said Terril, immediately after executing the said bill of sale, returned to his residence in the county of St. Louis, aforesaid, and there continued to reside until about the tenth day of February, 1821, when he died, being then in possession of the said slave in the declaration mentioned, and of the others named in the bill of sale, and, by his will, directed his executors to sell and dispose of the slave in question, along with the others named in the bill of sale. That the executors of Terril, in pursuance of his will, and in conformity with the law, advertised in one of the newspapers of the city, and sold at public sale the slave in question, who was purchased by Mrs. Mary Lisa, who sold to Beebe, who sold to the plaintiff in error. That the said bill of sale, from Terril to Potter was never registered or recorded, and that neither Mrs. Lisa nor Beebe, nor the plaintiff in error, had any notice or knowledge until after the sale and delivery to the plaintiff in error, of the existence of the bill of sale aforesaid, to Potter; who, during the whole of said time, resided in the state of Louisiana, and never had possession of the slave in question. Many other facts are found, which the court, in the view which they take of the subject, need not consider.

For the plaintiff in error it is insisted that the bill of sale is fraudulent and void as to him, who purchased for a valuable consideration, and without notice, and such is the opinion of this court. Whether this case is reached by either of the statutes of 13 and 27 Eliz., or falls within the provisions of our own statutes on the subject (as the counsel have contended), need not be settled, since it is the opinion of this court, that upon the principles of the common law, and entirely independent of either our own or the British statutes, the judgment of the circuit court may well be reversed.

As to personal property, possession is not merely the evidence of title, but will, of itself, give title as to those who trust

to such possession in dealing with or giving credit to the apparent owner; for that purpose, no precise term of time is necessary. In every case much must depend upon the kind of property, the relative position of the parties, and acts of ownership exercised. But the principle is one of reason and common sense, is universal and applicable to every species of property, real as well as personal. Thus, though the title to real property rests in grants and indentures, to which persons resort for information, yet possession alone is sufficient to give perfect title. In the case of personal property, the party in possession gives to the world the best evidence of title, and it would be a strange absurdity, which the common law never commits, to postpone a title derived from and supported by the best possible evidence of a continued, unexplained, uninterrupted, absolute possession, to which all can look, and of which all may judge, to one known only to parties, derived from an act which may or may not have been fraudulent, and of which they only can judge. Thus much as to what should be the law, were this a case of the first impression, and the principles of the common law now, for the first time, to be applied or expounded. But that has not been left for this court to do. We have the highest authority to be found in the courts of this country and in England for our guide. In 1 Cranch, 309; 2 Hen. and Mun. 302 [*Fitzhugh v. Anderson*, 3 Am. Dec. 625]; 9 Johns. 337 [*Sturtevant v. Ballard*, 6 Am. Dec. 281]; and Cowp. 434, we find it laid down by some of the ablest judges who have ever sat upon the bench, that the statutes of the 13 and 27 Eliz. for the prevention of frauds are to be considered as merely declaratory of the pre-existent principles of the common law. Numerous cases adjudged since those statutes, leave no room to question upon the statement of facts in this cause, but that the plaintiff in error would be protected, were he creditor of Terril instead of being the purchaser of his property, and that, too, whether he became a creditor before or after the bill of sale to Potter.

It is contended that decisions have been made, touching the rights of purchase upon the principles of the common law, as declared by those statutes. But the absence of authority, if to be used as argument in the cause, is to be taken rather in their favor than against them. The purchasers themselves could have no interest in raising the question, whilst they were permitted to remain in quiet possession of the property purchased, and the fact that few or no attempts, either on the part of cred-

itors or fraudulent claimants, have been made to disturb that possession, argues strongly in their favor. And, upon the principles of the common law, it would seem, to this court, that if any distinction should be made between creditors and purchasers, it should be in favor of the latter. The creditor at large relies upon his knowledge of his debtor's character, his general property, and apparent solvency, and, by the very credit he gives, assists him, in some sort, to give further credit and practice greater fraud; whereas the purchaser, trusting neither to the title he may have to any specific property, pays the value of it, takes the property into his possession, and thereby strips the vendor, or fraudulent debtor, in some sort, of the means of committing further fraud. The law goes upon the presumption that the man who is seen in the uncontrolled possession of personal property, has acquired the title legally, or else, for some fraudulent end, has been permitted to palm himself upon the world as the legal owner, and it will visit upon him who supplies the means of such deception the loss of those means.

In the case before the court, Terril was the original owner of the slave, remained always in possession of, and exercised acts of ownership over her. The claimant under the bill of sale, residing in a distant country, puts the bill of sale in his pocket, gives no notice of its existence, and makes no claim of property. No human prudence could have guarded against the fraud, if fraud was intended; and if none was intended, the negligence, or blind confidence of the defendant in error, is a sufficient reason, in law, why he should sustain the loss, rather than the plaintiff. A stronger case could hardly be conceived.

Let the judgment of the circuit court be therefore reversed, and judgment entered up in this court for the defendant on the special verdict.

VENDOR RETAINING POSSESSION.—The doctrine here laid down, that where a vendor of goods remains in possession after the sale, such sale will be fraudulent *per se*, and void as against subsequent purchasers in good faith has had a somewhat checkered career in Missouri. For some years after the decision in *Rochelave v. Potter* was made, the principle was regarded as conclusively established, and was steadily adhered to by the courts. Then came the case of *Shepherd v. Trigg*, 7 Mo. 151, in which the previous decisions were reviewed and substantially overruled, and it was determined that the retention of possession of chattels by a vendor after a sale was not fraudulent in itself, but was merely evidence of fraud which might be rebutted. This doctrine in its turn became firmly established, and being incorporated into the statutes of the state, remained the settled law of Missouri until 1865, when the former rule was restored by the legislature.

Wagner, J., in *Clafin v. Rosenberg*, 42 Mo. 439, gives the following statement of the origin of the doctrine of the principal case on this subject, and of its history in Missouri: "The subject of sales of goods and chattels without delivery has given rise to more protracted discussion and more contradictory decisions than any other matter in the whole range of the law. The construction given to the English statute of frauds in an early day was that the retention of personal property by the vendor, after sale, amounted to fraud *per se*; that it was conclusive and could not be rebutted by proofs of honesty and fairness in the transaction. The leading cases supporting this rigid and stringent rule are *Twyne's case*, 2 Co. 80, and *Edwards v. Harbin*, 2 T. R. 587, in England, and they were followed and received the sanction of the United States supreme court in *Hamilton v. Russell*, 1 Cranch, 97, and many of the states have adopted the same doctrine. In other states a more liberal view has been taken, and it is held that the retaining of the property after sale is only evidence of fraud, susceptible of being explained, and should be passed upon as a question of fact by the jury. In the early history of this state, the court adhered to the law as settled in *Twyne's case*, and adopted in the national tribunal: *Rocheblave v. Potter*, 1 Mo. 561; *Foster v. Wallace*, 2 Id. 231; *Sibly v. Hood*, 3 Id. 290; *King v. Bailey*, 6 Id. 576. But the cases holding this view of the law were all shaken or overruled in *Shepherd v. Trigg*, 7 Mo. 151, where, for the first time, it was adjudged that in all cases the purchaser might show why he left the vendor in possession of the property, and that such possession was in good faith. In this conflict of judicial opinion the legislature interposed, and settled the law by statutory enactment, as declared in *Shepherd v. Trigg*. Several decisions were rendered by this court, giving the statute an interpretation and legal exposition, and it was supposed that the vexed question was conclusively settled and put at rest, till the revisors in 1865, inserted the tenth section, which unsettled the law, as it had existed for more than twenty years, and practically restored the ancient rule."

The section of the statute to which the learned judge here refers, is as follows: "Every sale made by a vendor of goods and chattels, in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property) and be followed by an actual and continued change of the possession of the things sold, shall be held to be fraudulent, and void as against the creditors of the vendor or subsequent purchasers in good faith." *Wagn. Missouri Stat. (1870) p. 281, sec. 10*. It is thus seen that after having been substantially overruled, for twenty years, the doctrine of the principal case was re-established as a part of the law of the state.

THE RULE in *Shepherd v. Trigg* was approved in a number of cases: *Ross v. Crutsinger*, 7 Mo. 245; *King v. Bailey*, 8 Id. 332; *Milburn v. Waugh*, 11 Id. 369. Under the statute afterwards enacted in accordance with the principle of that case, the retention of possession by the vendor, though it did not of itself render the sale void, was conclusive evidence of fraud, unless there was proof to satisfy the jury that the sale was made in good faith and without any intent to hinder, delay or defraud creditors, etc.; and the jury were the exclusive judges of the intent: *State v. Smith*, 31 Mo. 566; *State v. Rosenfield*, 35 Id. 472; *State v. Evans*, 38 Id. 170.

THE DOCTRINE OF THE PRINCIPAL CASE, that where the vendor retains possession, the sale, as to subsequent purchasers in good faith and without notice, is *per se*, fraudulent and void, is in accordance with the Pennsylvania rule as established in *Clow v. Woods*, 9 Am. Dec. 346. In most of the states, how-

ever, the rule prevails that such retention of possession is merely evidence, though strong, and if not rebutted, conclusive evidence, of fraud: *Clayborn v. Hill*, 1 Am. Dec. 452; *Hodges v. Blount*, Id. 563; *Barrow v. Paxton*, 4 Id. 354; *Sturtevant v. Ballard*, 6 Id. 281, and cases cited in the note thereto; *Patten v. Smith*, 10 Id. 166; *Mason v. Baker*, Id. 724. See, also, *Coburn v. Pickering*, *post*, and the note thereto, where the doctrine of the New Hampshire courts on this subject is stated.

McCLENTICKS v. BRYANT.

[1 MISSOURI, 598.]

PUBLIC AGENTS ARE PERSONALLY LIABLE when they make a contract beyond their authority, and also when they use apt words to bind themselves. If they are to let a contract on receiving certain moneys, with which to make payment, they are personally responsible if they contract prematurely before receiving the moneys.

APPEAL from the circuit court. The opinion states the case.

By Court, McGIBB, C. J. This was an action of debt, brought by McCleinticks against defendants on a bond for the payment of a sum of money. The declaration is drawn on this bond, and oyer is craved and given. The bond is in these words, to wit: "We, the commissioners for the sale of lots in the town of Pinckney, promise to pay, or cause to be paid, to Thomas and Robert McCleinticks, or their assigns, on or before the first day of March next, the sum of thirteen hundred and twenty dollars, which we owe to them for building a jail in the town of Pinckney. Witness our hands and seals, etc. Signed, David Bryant, Andrew Fourt, Moses Summers."

The defendants plead: 1. *Non est factum*; 2. Fraud generally; and, 3. A special plea in bar. On the first and second pleas issues were joined, and they remain yet undisposed of. The special plea in bar sets out, that the said defendants were, by the act establishing the county of Montgomery, appointed commissioners of the court-house and jail for the said county, and states, that by said act, they had full power to point out and fix upon the most suitable place thereon to erect a court-house and jail, and that the place so settled should be the permanent seat of justice for said county. That the said commissioners were authorized by said act to purchase, or receive a donation of land to them, for the use of the county, for a county seat of justice; that they were authorized to lay off said land into lots, and sell said lots for ready money, or on a credit not exceeding twelve months, as they should deem proper; and that they

should apply the proceeds first to the building of a sufficient jail, and the remainder, if any, to building a court-house. That they did buy a tract of land, laid it off into lots, and sold the same on credit; that they, in pursuance of said act, let the building of a jail to the lowest bidder; and that plaintiffs were the lowest bidders, and that they gave their obligation to build said jail; and that the said defendants, for building said jail, gave the obligation sued on, and for no other purpose or consideration whatever; and that they gave said bill single obligatory for and on behalf of said county, in their public capacity, as commissioners as aforesaid, and not otherwise. It is also alleged, that they had not at any time since the said contract was made, nor before, any of the money arising from the sale of said lots to pay said demand. There are several pleas of like nature, all the substance of which is condensed within the statement above. To these pleas there are replications, all of which are demurred to by the defendants; the demurrers were sustained and judgment for defendants, to reverse which the cause is brought here.

The sustaining these demurrers is complained of as error. These replications are clearly bad; but then it behooves the defendants to have good pleas, otherwise they cannot have judgment. The whole question, then, is thrown back on the nature of this instrument of writing sued on, whether it was lawfully given by public agents acting in pursuance of their authority. Public agents may lawfully bind themselves, if they think fit to do so, and do it by using apt words to that effect. They may bind themselves, if they make a contract beyond their authority. The court is unanimous on the point, that the defendants are liable, and on this plain ground, that the commissioners had no power, as commissioners, to bind the county, and that the county is not, nor can be by the commissioners, bound to pay said debt. The fourth section of said act provides that the land acquired shall be by the commissioners laid off into lots; that they shall, under the direction of the commissioners, be sold for ready money, or on a credit not to exceed twelve months; and that, when the purchase-money is paid, and not before, the commissioners shall make title to the purchaser, and the proceeds of such sale shall be then applied, after paying for the land, first to the building of a jail, and then, if any surplus, to the building of a court-house. The true and apparent construction of this act is, that the commissioners are not required to let out the building of a jail, till they have re-

ceived the money for the lots, because, before that time, there can be no proceeds. If we take it, then, that the commissioners obeyed the act, they had the money when they let the jail; and if they had it not, they ought to have had it, and builders had a clear right to expect the fact was so, for so was the law; and if they had it not, it was their own folly to make a premature contract; and the law nowhere authorizes them to pledge the faith of the county. Their funds were limited and special, and their authority to build founded on the fact of proceeds being in their hands in amount sufficient to build a jail. It is, therefore, clear that the defendants have made the contract their own. They have made it their own, because they have exceeded their authority; and secondly, because they have used apt words to bind themselves.

The case of *Hudson v. Dexter*, 1 Cranch, 345, has been cited and relied on as most strong to prove the defendants are not liable. In that case the question was whether Dexter or the government was liable; and the court held the government was liable and not Dexter, and the great leading rule is, that if the defendant is not liable, the government is. Now, in this case, there can be no pretense that the county is liable. Dexter was warranted by law, and the exigency growing out of the operation of the law, to rent a house when he did so. But here there is no such exigency. They were not required to proceed with the jail at all, till they were in possession of the funds; and having done so, they made the contract entirely their own, if they have used apt words to create a contract. That the words are apt to create a contract there can be no doubt. The words are, that "we, the commissioners for the court-house and jail of Pinckney, promise to pay, etc., which sum we owe to them for building a jail." They say they owe for building a jail; here is a clear contract to pay. The words are apt to charge them as commissioners, if they had power in that capacity to deal in credit; but we have shown they could not in that capacity deal in credit; and having done so, they bound their own credit, and none else. The word commissioners here makes no difference. It is true, it shows clearly who they were who made the contract, but it does not alter or enlarge their power; and the word has no more effect in this case than the word gentlemen would if it had been used.

Upon this view of the case the judgment is reversed, and the cause remanded for the trial of the issue yet undisposed of.

LIABILITY OF PUBLIC AGENT.—The general rule undoubtedly is that a public agent is not personally liable on any contract made within the scope of his authority: *Brown v. Austin*, 2 Am. Dec. 11; *Walker v. Swartwout*, 7 Id. 334; *Stinchfield v. Little*, 10 Id. 65; *Freeman v. Otis*, 6 Id. 66; *Tutt v. Hobbs*, 17 Mo. 486; *McDonald v. Franklin Co.*, 2 Id. 218; *Ruggles v. Washington Co.*, 3 Id. 501. For, as Chancellor Kent says, 2 Kent's Com. 632, it is not to be presumed that one who contracts with an agent of the government, or of a state, relies upon the personal responsibility of the agent. Still he may do so, and therefore it resolves itself into a question of intention. If the agent signifies an intention to bind himself personally, he will be liable.

THERE IS A CLEAR DISTINCTION, however, between the ordinary case of a public agent contracting within the scope of his authority and the principal case where the contract was wholly unauthorized. This distinction is noticed and made the rule of decision in *McDonald v. Franklin Co.*, 2 Mo. 218, and *Ruggles v. Washington Co.*, 3 Id. 501. The true principle would seem to be that if the public agent is acting within the line of his duty the contract, though signed and sealed in his individual name, is not binding upon him: *Stinchfield v. Little*, 10 Am. Dec. 65. But his agency will not protect him in anything done outside of it as in the principal case; nor if he disavows his agency by denying to the government that he made the contract, as in *Freeman v. Otis*, 6 Am. Dec. 66.

ASHLEY v. BIRD.

[1 MISSOURI, 640.]

POWER TO SELL REAL ESTATE.—A power of attorney "to act in all my business, in all concerns, as if I was present myself, and to stand good in law, in all my land and other business" gives no power to sell land.

POWER OF ATTORNEY.—Parol evidence can not enlarge the scope of an authority in writing.

ERROR to the circuit court. The opinion states the case.

By Court, McGIRE, C. J. This was an action of assumpsit, for money had and received. The declaration charges that defendant received of the intestate, in his life-time, certain sums of money, to the use of the intestate, etc.

The first plea is non-assumpsit; the second, payment on the first day of June, in the year 1822. Issue is taken on the first plea, and it is found for plaintiff. To the second plea there is a replication that the defendant did not, on the first day of June, 1822, pay said sum of money. This plea is found for the plaintiff also. Judgment was entered for the plaintiff; to reverse which, the cause is brought to this court.

By the bill of exceptions, it appears that the defendant, Bird, in the year 1819, made the following instrument in writing: "Be it known, to whom it shall concern, that I, Thompson Bird, by

virtue of a power of attorney, from Abraham Bird, of Baton Rouge, have sold to Elias Rector, of St. Louis, the one half of the ground located by virtue of a New Madrid certificate, No. 379, for six hundred and forty acres, dated June 19, 1818, and located to embrace the whole fractional sections 28 and 21, and as much of the east half of section 29, T. No. 57, north of the base line, range No. 4 west of the fifth principal meridian, as will include the said quantity of six hundred and forty acres, for the sum of nine hundred and sixty dollars. In consideration of which, I, the said Thompson Bird, do hereby bind the said Abraham Bird, to make a good and sufficient deed of general warranty, to the said Elias Rector, for the said one half of six hundred and forty acres, as soon as the patent for the same can be obtained from the United States, and at all events, within fifteen months from this date. In witness, I, the said Thompson Bird, have hereunto set the hand and the seal of the said Abraham Bird. Abraham Bird. (Seal.)"

Thompson Bird claimed to be the attorney in fact of Abraham Bird, under the following power of attorney, to wit: "Baton Rouge, February 6, 1817. Know all men whom it may concern that I, Abraham Bird, do nominate and appoint Thompson Bird, as my true and lawful attorney, to act in all my business, in all concerns, as if I was present myself, and to stand good in law, in all my land and other business in the Missouri Territory; this I acknowledge to be my full power invested in him, as witness my hand and seal, this day and date, etc. Abraham Bird. (Seal.)"

In this case there are many errors assigned, chiefly growing out of the effect of this power of attorney. We will not notice the errors, in the order in which they have been assigned, but will notice three points in this case only: 1. Did this power of attorney authorize Thompson Bird to sell land, or to make a covenant for the sale so as to bind his principal; and if it did not, what is the consequence? 2. Can the power of attorney be helped out by parol testimony, so as to enlarge its effects, over and above the effect apparent on the power itself? 3. Was the issue on the plea of payment immaterial? All other points in this case are subordinate to these three, and are, substantially, contained in them. As to the first point, we have not seen an adjudged case like it. The rule of law is that naked power, without an interest coupled therewith, is to be strictly pursued. The rules, however, of arriving at the quantity of power granted, are the same as would prevail in the construction of any other deed, namely, most strictly against the grantor, where the words

are ambiguous in themselves; but the words in a deed are to be understood according to their ordinary acceptance.

The operative words in the power are, that Thompson Bird is attorney for Abraham Bird, in all his business and all his concerns, as if he, Abraham Bird, were personally present, and to stand good in law, in all Abraham Bird's lands, and other business in Missouri territory. We are entirely at a loss to know what effect this power of attorney is to have. Shall we say that this gives any power to sell land, or to make any covenant for the sale of land? The power does not give the least hint as to what this business is. Shall we then guess at it? And if the court should undertake to guess we might entirely fail. There is such a thing as a power of attorney being void for uncertainty, and this one is nearly so. At all events, we are clearly of opinion, that this instrument gives no power to sell land. It may, perhaps, give authority to pay taxes and take possession of land, but not much else. The next question is, can parol testimony be admitted to enlarge the powers of a written instrument? We believe that no case can be found which proceeds on legal principles, that will go as far as asked for in this case. Let us see what is proposed to be done in this case. The power of attorney gives full power to do something, and here stops. The testimony proposes to show what the thing is, which is to be done. If this is admitted, the power or authority will consist of part written evidence and part unwritten. Where shall one be directed, if this is the law, to find the unwritten part of the power. It seems the bare statement of this proposition is enough to induce the court to resist the evidence; but on this point, we are not without authority.

It is said, in Phil. Ev. 423, that parol evidence cannot be admitted to contradict, add to, or vary the terms of a will or deed, or other written instrument; see, also, same book, 424, where it is said, in an action on a bond, a party will not be permitted to show a condition different from that expressed in the bond; and a conveyance cannot be averred by parol to be to another use or intent than that expressed in the conveyance. This is the rule of law, but there may be some exceptions. One is, where the deed is impeached for fraud; but the case before us is not that case. Upon this point, we are with the defendants in error. The next question is, is the issue on the plea of payment immaterial? The authorities cited by the plaintiff in error do not support the position taken by him. This plea is a plea of *solvit ad diem*. The replication is *non*

solvit ad diem. The plaintiff argues, he might have paid a less sum at another day. Suppose he proved a less sum on that day, the consequence in law would be, that the jury should allow him for it. And suppose he paid it before the day, this would be good evidence to support the plea *solvit ad diem*. In Chitty, 555, it is said, the only replication to a plea *solvit ad* or *post diem*, is a denial of the payment. There is a case put in the books of this kind; the money is due on the first of June; plea, payment on the fifth of June; replication, no payment on the fifth of June. This is holden to be an immaterial issue; but this case is different, and upon the whole of this matter, we are clear that the issue is well enough.

The judgment of the court below is affirmed, with five per cent. damages.

PERRY v. PRICE.

[1 MISSOURI, 664.]

CORPORATE SEAL.—A corporation may use any seal; but whatever seal it uses must be shown to have been adopted by the corporation and affixed by the proper officer. If the seal used is not shown to have been adopted by the corporation, the instrument is invalid, although a majority of the directors hold a meeting, at which they undertake to ratify "the execution of the writing."

PETITION for rehearing. The opinion states the case.

By Court, TOMPKINS, J. It is contended by Price's counsel, that the authority in Shep. Touch. 57, has been misunderstood. The words of the author are, that a corporation may seal a deed by any other seal than their common seal, and the deed is never the worse. We understand this rule to mean that when any seal is used, it must still be proved to have been adopted by the corporation. If the common seal is used, it must be proved by a corporate act to be the common seal; if another than the common seal is used, it must first be proved that the corporation in council agreed and ordered such seal to be used in that particular instance, and then it must be proved that the officer, whose duty it may be to affix the seal, did do so. When this is done, then only is it true, that a corporation may make a deed by any other seal than the common seal. Those things do not exist in this case, nor does the approbation of seven directors afterwards, ratifying the execution of the writing, as they call it, make the matter any better. They only ratify the execution of the writing. This ratification does not make the

instrument a deed, unless it were a deed before. It does not make a smooth plaster of wax a sealed impression. These things, we know, are technicalities; but it is to be remembered, that a corporation only exists by technical fiction, and all it does must be technical, and in general, can only be known by using signs, which the law has given it power to use, to evince its existence or its consent. We do not think there is any analogy between the cases of sealing by individuals and corporations. In the case of a natural person, there is but one will to be proved; but in the case of aggregate corporations, there are many natural wills, and they must be conjoined before any corporate will is produced; and this conjunction is to be proven by proof of the common or special sign of consents having been given. In the case of a natural person, the fact that any seal was used by him, is proof that his whole will concurred in assent to the act done. Therefore, the analogy fails.

The petition is overruled.

PROVING CORPORATE SEAL.—The seal of a corporation does not prove itself; it must be proved to be the corporate seal: *Den v. Vreelandt*, 11 Am. Dec. 551, and note; and must be shown to have been duly affixed, which is a matter for the jury to determine: *Berks Turnpike v. Myers*, 9 Am. Dec. 402.

CARDER v. FOREHAND.

[1 MISSOURI, 704.]

SEDUCTION, EVIDENCE THAT THE CHARACTER OF THE WOMAN SEDUCED, for chastity, was bad, is admissible on behalf of defendant in an action for debauching plaintiff's daughter.

ERROR to the circuit court. The opinion states the case.

By Court, WASH, J. This was an action of trespass on the case, brought by Forehand, the defendant in error, against Carder, the plaintiff in error, in the court below, for debauching the daughter of the defendant, and getting her with a child, whereby he lost the services of his said servant, and was put to great trouble and expense, in nursing and taking care of her, etc. On the plea of not guilty, the parties went to trial, and the plaintiff below obtained a verdict and judgment for forty dollars; to reverse which judgment, Carder prosecuted his writ of error in this court. It appears from a bill of exceptions in the cause, that "on the trial of this cause the defendant offered to prove that the general character of the plaintiff's daughter, in the declaration mentioned, for chastity, was bad," etc.; and

that common report said she had illicitly cohabited for some time with a married man, who was reputed the father of her first child; and that the court refused to permit any of this testimony to go to the jury. From the facts preserved by another bill of exceptions, it is very apparent that little injury could have resulted from this refusal of the court, and the amount of the verdict shows that the worth of character could have entered but little into the estimate of damages by the jury. Yet it was certainly competent for the defendant to give evidence of general character in mitigation of damages, and the circuit court erred in not permitting them to do so. And for that reason the judgment must be reversed, and the cause remanded for a new trial.

EVIDENCE OF CHARACTER IN SEDUCTION.—In *White v. Murland*, 71 Ill. 250, it was decided, as in the principal case, that in an action brought by a father for the seduction of his daughter, it was admissible to show in mitigation of damages that the daughter's character for chastity was bad previous to the alleged injury. In *Wallace v. Clark*, 5 Am. Dec. 654, it was held, however, that evidence of the daughter's general bad character was inadmissible, and also that it was not admissible to prove that her character for virtue was bad, unless, perhaps, the father asked damages for injury done to his feelings, or to the reputation of his family. In analogy to the doctrine of the principal case it was determined in *Clouser v. Clapper*, 59 Ind. 548, that in an action by a husband for the seduction of his wife, the defendant might prove in mitigation that the wife's character for virtue was bad if it was not occasioned by his own act.

McDONALD v. WALTON.

[1 MISSOURI, 726.]

LIMITATIONS, NO PERSON TO BRING SUIT.—When there is no person competent to bring an action to recover property, its adverse possession can not vest title in the wrongful possessor.

APPEAL from the circuit court. The opinion states the case.

By Court, TOMPKINS, J. This was an action of detinue brought by the appellant, McDonald, as administrator, against Walton, the appellee, to recover certain slaves. The pleas were *non-detinet* and the statute of limitations; a verdict was found for the defendant on the issues made up; and to reverse the judgment rendered on that verdict, the present appeal is taken. From the facts saved it appears that the plaintiff's intestate, David Polk, *alias* Pogue, and Rebecca Walton, intermarried in the state of North Carolina, in the year 1805; that before, and at the time of the marriage, said Polk was possessed of certain slaves, in the bill of exceptions mentioned, and for which, and

their descendants, this action was brought. That shortly after said marriage, said Polk and wife removed from North Carolina to Kentucky, and settled on an island in the Ohio river, taking said slaves with them. That in January, 1807, or 1808, said Polk died at his residence in Kentucky, and that in the last of February, or first of March, of the same year, the said Rebecca, widow of Polk, left Kentucky, and removed to upper Louisiana, now Missouri, taking with her the aforesaid slaves, and one other, born of one of the first mentioned, in Kentucky. That said Polk had no children, and at the time of his death had no family living with him, except his wife and the aforesaid slaves. That in the month of April of the same year, the said Rebecca intermarried with one Absalom Chapman, a young man without property; that soon after their marriage, Chapman and his wife returned to Kentucky on a visit, leaving the slaves here, and after an absence of a few months, returned and settled at Point Labaddie, in St. Louis county, having said slaves in their possession. That after living there more than a year, they removed to some place unknown in the lower country. That about the year 1815, said Chapman and wife returned to St. Louis county, bringing with them said slaves, and their increase, and remained in possession of them till 1817, when Chapman died, and a few months thereafter said Rebecca died, leaving several children of the marriage. That on the nineteenth of June, 1826, the plaintiff obtained letters of administration of the estate of said D. Polk or Pogue; that Chapman appointed said defendant the executor of his last will; that the defendant having settled the estate of the testator, was appointed guardian to the children of Chapman, by said marriage, and as such now holds some of the slaves aforesaid. No other material evidence appears to have been given.

The court, at the instance of the defendant, instructed the jury that if they found from the evidence that Walton, and those under whom he holds, have had exclusive possession of any of the slaves in question, for the period of fifteen years, under a claim of title adverse to and in exclusion of all other persons, they ought to find for the defendant. Two other instructions, varying a little in terms, were prayed and given for defendant. The plaintiff prayed the court to instruct the jury that although Walton, the defendant, had possession of the slaves for five years, still if there was no person authorized to sue for said slaves, in right of Pogue, till 1826, that possession is no bar to the action. The plaintiff prayed a second instruc-

tion, varying in terms, but substantially the same, both of which were refused by the court; and the court instructed the jury that if Pogue himself were suing here he would be barred by the possession here proved; and that his administrator could have no other privilege than the intestate himself could have, were he now living. Letters of administration may at any time be taken out after the death of the intestate; and if the right of action for these slaves had accrued to Polk, *alias* Pogue, there is no doubt but the administrator would have been barred. But before the administrator was appointed he could have no right of action. The defendant seems to have abandoned all thought of ascertaining his right under the statute of limitations, and to rest his claim on the long, uninterrupted adverse possession of himself and those under whom he claims: Peake's Evidence, pp. 22, 24, notes E. and F., have been referred to. The first of these causes is *Gray v. Gardner*, 3 Mass., where it is said that after twenty years' acquiescence by the heirs of an intestate in possession of the real estate of their ancestor, holden under a sale by the administrator, the court will presume the administrator took the oath, and made all the advertisements previous to the sale, as required by law, evidence being given of the license to sell, and of the actual sale. But in none of these cases is mere length of possession held to be of much weight, and we are disposed to allow no pretensions to adverse possession when there was no person in existence to reclaim the property. Some cases decided in Virginia and in the supreme court of the United States, have also been cited. The sum of these is, that in Virginia, by analogy to the statute of limitations of that state, five years' peaceable possession of a slave will give a good title; but until our legislature shall express its will more clearly than it has in our statute of limitations, we are inclined to put the person possessed of such property to maintain his right to it, as he would have done at common law.

It is admitted that the law of Kentucky (where Pogue died) must regulate the distribution of these slaves; but it is barely possible that the widow of Pogue could, in so short a time after his death, have left that state, rightfully possessed of them. This we can say without much hesitation, although no evidence of the delays made necessary by the laws of Kentucky, has been offered. But the testimony introduced by the plaintiff was acknowledged sufficient to throw on the defendant the burden of proving any right he, or his testator, might have had under

those laws, or by any other means. The removal to Upper Louisiana (now Missouri) in a few weeks after the death of Pogue, the early marriage of the widow with Chapman, and the subsequent removal from these, then western limits of American settlements, to parts unknown, induce a strong suspicion of industrious concealment of these slaves from somebody. If it be true that, through the laws of Kentucky, these heirs of Chapman derive any right to the slaves in question, that right can be established against Pogue's administrator. It is the opinion of the court, that the instructions prayed for by the plaintiff, should have been given to the jury.

The judgment of the circuit court is reversed, and this cause is remanded for further proceedings, in conformity with this opinion.

The principle that there must be some one competent to bring the action before the statute will begin to run, was applied in *Polk v. Allen*, 19 Mo. 467, where it was held, on the authority of the principal case, that the statute of limitations commences running against an administrator from the date of his letters. See, also, Angell on Lim. secs. 54 and 55, and cases cited. A contrary doctrine to that of *Polk v. Allen*, 19 Mo. 467, was laid down in *Tynan v. Walker*, 35 Cal. 634, where it was held, that under the provision in the statutes, that actions for causes therein specified shall be brought within certain periods "after the cause of action shall have accrued," the statute would commence running in favor of one who had taken adverse possession of an intestate's land, from the death of such intestate, notwithstanding the fact that no administrator was appointed until twelve years afterwards. The decision was put, on the ground that where the statute makes no exception the court can make none.

KEAN v. NEWELL.

[1 MISSOURI, 764.]

DEPOSITION, TIME OF TAKING.—If the notice states that the deposition will be taken between the hours of ten o'clock A. M. and six o'clock P. M., the deposition should not be admitted in evidence, if the certificate shows it to have been taken between eight o'clock A. M. and six o'clock P. M.

SHERIFF'S SALE OF CHATTELS.—The sheriff must be allowed much discretion; and this discretion must be exercised honestly and soundly, with a view of making the most out of the property. That the property is not present at the sale does not necessarily render it fraudulent or void.

FRAUD IN SHERIFF'S SALE does not prejudice an innocent purchaser at the sale, nor even the innocent vendee of a purchaser *mala fide*.

APPEAL from the circuit court. The opinion states the case.

By Court, WASH, J. This was an action of replevin for a horse commenced by Newell against Kean in the circuit court of Pike county, and removed by change of *venue* into the Boone

circuit court, where the plaintiff, Newell, had judgment; to reverse which, Kean now prosecutes his appeal to this court. The material facts, as preserved in the record, are, that in August, 1823, two writs of execution were sued out of the Ralls circuit court against Newell, by virtue of which the sheriff of Ralls county made a sale in September following, of the horse sued for, to one Bates, who sold the same for a valuable consideration to one Longmire, who sold the same for a valuable consideration to Kean, the defendant below. That at the time of the sale by the sheriff to Bates, the property was not present to be seen by, and delivered to, persons who might wish to purchase; and that many articles of personal property were sold along with the horse, in the same lot or parcel, without being set up or offered separately. With reference to this state of facts, the circuit court instructed the jury, amongst other things, that if from the evidence, it should appear to them, that the articles purchased by Bates (of which there was a long list of various kinds), were exposed to public sale in one lot and in bulk, and so purchased; that such sale was in law void and illegal, and conveyed no title to the purchaser; and second, that in the public sale of the personal property by a sheriff, the presence of the property at the sale, for inspection and delivery to the purchaser is indispensable, and without it such sale is void and illegal; and conveys no title to the purchaser. Other instructions were given and refused, which it becomes unnecessary to notice, from the view we have taken of the subject. One other point relied on by the appellant's counsel is that the depositions of Dabney Jones and George Mock ought to have been suppressed. They were taken (as appeared from the certificate of the officer before whom they were taken), between the hours of eight o'clock in the forenoon, and six o'clock in the afternoon. The notice under which they were taken, fixed the time for taking between the hours of ten o'clock in the forenoon and six o'clock in the afternoon. The circuit court overruled the motion made by the defendant's counsel, to exclude said depositions for want of conformity to the notice in regard to the time of taking, whereupon the defendant tendered his bill of exceptions, and now assigns it for error. On this point we entertain no doubt. The circuit court erred, and the judgment must be reversed. The interest of the parties may require us to dispose of the questions growing out of the instructions given by the circuit court to the jury, and the counsel on both sides have intimated a wish to that effect.

No particular mode is pointed out, or provided in the statute,

by which the sheriff is to offer property for sale, on which he has levied his execution. Much discretion is necessarily allowed him, which he is bound to exercise honestly as well as soundly. He is bound to make the most of the property, and if either plaintiff or defendant is injured by his misconduct, whether it be the result of either ignorance or corruption, he may be made to answer in damages. By the levy of his execution he acquired a legal title to the chattel, and whether he is faithful or not to the trust reposed in him by the law, his conveyance will pass the title to a *bona fide* purchaser. Fraud will vitiate a sheriff's sale, as well as any other, where the person claiming property by virtue thereof, participated in the fraud; and for evident fraud, or gross misconduct on the part of the sheriff, the court, upon application, will set aside the sale. Until that be done, the title, passing by virtue of such a sale, cannot be disturbed, unless upon proof that the purchaser partook of the fraud. And when the property has once passed from the hands of the first fraudulent purchaser into those of one altogether ignorant of the fraud, for a valuable consideration, public policy requires that the party injured by the act of the sheriff, should be left to seek his redress in damages, instead of being permitted to pursue his property. The absence of the property at the time of sale would certainly be a strong circumstance (unexplained) to subject the sheriff to damages, for a dishonest or unsound exercise of his discretion, and would go far to satisfy a jury that the purchaser participated in the fraud. Yet it might well be, that a person would honestly buy and run the risk of getting the article. Such sales take place every day between individuals.

The circuit court, therefore, erred in giving the instructions it did to the jury, and its judgment must be reversed, with costs, and the cause remanded, to be proceeded in conformity to this opinion.

MCGEEK, C. J. I concur in the foregoing opinion, except the last point; and with regard to that matter, I am of opinion that the property ought to be present when sold, unless in some cases, where, from the nature of the thing, it could not be so present.

PRESERVE OF PROPERTY AT SALE.—It is held in *Cresson v. Stout*, 8 Am. Dec. 373, that at a sale of chattels on execution, the property should be present so that it may be examined by the bidders. And, generally, the sheriff should conduct the sale as a prudent man would do in selling his own property: *McLeod v. Pearce*, 11 Am. Dec. 742. The decided preponderance of authorities is in favor of the proposition that if the property is not present at the sale, such sale will be void: *Freeman on Executions*, sec. 290.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

CHESLEY v. THOMPSON.

[3 NEW HAMPSHIRE, 9.]

REMEDY AGAINST CO-TENANT FOR NEGLIGENCE.—Where a mill, owned in common, was burned, through the negligence of one of the tenants in common, it was held that his co-tenants might maintain a joint action on the case against him therefor.

ACTION on the case. The declaration alleged, in substance, that the plaintiffs and the defendant, five persons in number, were possessed, as tenants in common, of a certain saw-mill, each of the parties being entitled to the sole use of said mill for a certain number of days in the month, and that the defendant, during the days when he had sole use of said mill, so negligently kept the fire there that the mill was burned and destroyed. At the trial, upon the general issue, there was a verdict for the plaintiffs. Whereupon the defendant moved to arrest judgment: first, because one tenant in common cannot maintain an action against another; second, because the plaintiffs ought not to have brought a joint action.

Ela and Mason, for the plaintiffs.

Mitchell and I. Bartlett, for the defendant.

By Court. It is contended that one tenant in common cannot maintain an action against another, and this is true to a certain extent; but the rule is by no means broad enough to embrace the present case. For it has been held that if two several owners of houses have a river in common between them, and one of them corrupt the water, the other shall have an action on the case: Co. Lit. 200, b. And it seems that one tenant in

common may have case for waste against another: *Martyn v. Knowles*, 8 T. R. 145; *Heath v. Hubbard*, 4 East, 110; Bull, N. P. 34; 2 Saund. 47, f. g.; 1 Chit. Pl. 155, 170, 180; 15 Johns. 179; 3 Id. 175; 2 Id. 468.

In this case the mill has been destroyed by the negligence of the defendant, and we have no hesitation in overruling this objection. It is further contended that as the defendant is a tenant in common with the plaintiffs, and as all the tenants in common cannot join in bringing the action, each must have his several remedy. Had the mill been burnt by the negligence of a stranger to the title, there is no doubt that all the owners might have joined in the action: 1 Chit. 51; *Weller et al. v. Baker*, 2 Wils. 414. In *Daniels et al. v. Daniels*, 7 Mass. 135, case was maintained by several tenants in common against co-tenants, for the destruction of title deeds; and we are of opinion that the objection also must be overruled.

RILEY v. JAMESON.

[3 NEW HAMPSHIRE, 23.]

POSSESSION WITHOUT COLOR OF TITLE is limited in extent to the land actually occupied, for there can be no constructive possession in such a case.

AN ENTRY BY AN INFANT, having no father, but living with his mother, will be presumed to be in his own right until the contrary appears.

TRESPASS for breaking and entering plaintiff's close and cutting and carrying away his grass. Plea, the general issue. Possession was the only evidence of title offered on either side. It appeared that the *locus in quo* was on the west side of the Contoocook river, and was a part of lot No. 15, lying on both sides of said river; and that the plaintiff, previous to the year 1805, entered upon that part of the lot which lay east of the river and occupied it as his own, claiming the whole lot. There was no evidence that he had any color of title to the lot, or that he entered upon the part lying west of the river until 1806, when he entered and caused a portion of it to be cleared of wood and timber. It appeared, also, that the defendant, who was then a minor fourteen years of age, entered upon the *locus in quo* in 1805, in company with an elder and younger brother, and took and carried away wood. The defendant's father was dead at the time, and he was living in his mother's family, but there was no evidence that he entered by her command, or that of any other person.

The court instructed the jury that, the plaintiff having no color of title, that his entry upon the part east of the river did not give him possession of the part west of the river, but that his entry on the latter part, in 1806, was sufficient to enable him to maintain the action, unless the defendant had previously taken possession; but that if the defendant, in 1805, entered in his own right, which must be presumed until the contrary appeared, it was evidence of possession, sufficient to entitle him to a verdict, unless he afterwards abandoned the possession. Verdict for the defendant, and a motion for a new trial on the ground of misdirection.

R. Fletcher and Burnham, for the plaintiff.

Atherton, for the defendant.

By Court, RICHARDSON, C. J. As it distinctly appeared at the trial of this cause that the plaintiff had entered upon that part of lot No. 15, which lay on the east side of the river, claiming the whole lot, previous to the entry of the defendant upon that part of the lot which lay on the west side of the river; it is clear that if such entry and claim on the part of the plaintiff gave him possession of the whole lot, the first entry of the defendant was tortious, the jury were misdirected, and the plaintiff is entitled to a new trial. The first question then is, did the entry and claim of the plaintiff give him possession of the whole lot?

Littleton says: "If a man hath cause to enter into any lands or tenements in divers towns in one same county, if he enter into one parcel of the lands or tenements which are in one town, in the name of all the lands or tenements, into which he hath right to enter within all the towns of the same county, by such entry he shall have as good possession and seisin of all the lands and tenements whereof he hath title of entry, as if he had entered indeed into every parcel:" Lit., sec. 417. According to this general rule of Littleton, an entry into one of several parcels of land in the same county, in the name of all, gives a possession co-extensive with the right of entry. But Coke says, that this general rule must be understood with this limitation, "that the entry of a man, to recontinue his inheritance or freehold, must ensue his action for recovery of the same;" and this is the reason, as he says, why the rule is limited to lands in the same county: "For if the lands lie in several counties there must be several actions, and consequently several entries." "So if three men disseise me, severally, of

three several acres of land, being all in one county, and I enter into one acre in the name of all three acres, this is good for no more but that acre which I entered into, because each disseisor is a several tenant of the freehold, and as I must have several actions against them for recovery of the land, so my entry must be several:" Co. Lit. 251, a. and b.

Coke says: "If I enfeoff one acre of ground upon condition, and at another time I enfeoff the same man of another acre, in the same county, upon condition also, and both the conditions are broken, an entry into one in the name of both is not sufficient; for that I have no right to the land, nor action to recover the same, but a bare title; and therefore several entries must be made into the same in respect of the several conditions; but an entry into one part of the land, in the name of all the land, subject to one condition, is good, although the parcels be several, and in several towns:" Co. Lit. 252 b.

Coke says further that: "Some do take a diversity when an entry shall vest or divest an estate, that there must be several entries into the several parcels, but where the possession is in no man, but the freehold in law, is in the heir that entereth, there the general entry into one part reduceth all into his actual possession; and, therefore, if the lord entereth into a parcel generally, for a *mortmain*, or the feoffor for a general condition broken, or the disseisee into a parcel generally, the entry shall not vest nor divest in these or like cases, but for the parcel:" Co. Lit. 15 b.

The precise meaning of the word "possession," when applied to lands is not easily defined. We are not aware that any definition of it has ever been attempted. Littleton and Coke only attempted to illustrate the subject by examples; and it may be useful in the present case to pursue our inquiries in relation to it still further.

It is well settled that when a title to land is shown, possession shall be presumed to have accompanied the title, until the contrary is shown. Thus, where a person died in possession of land which had descended to him from his ancestors, leaving a widow and children, and on his death the widow entered and retained possession, it was held that the intendment of law was that she was in possession as guardian to her children, her entry not having been accompanied with any acts or declarations inconsistent with that character: *Byrne v. Van Hoesen*, 5 Johns. 66; *Jackson v. De Walls*, 7 Id. 157.

"It is a settled rule, that the doctrine of adverse possession

is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession, in subordination to the title of the true owner:" 9 Johns. 167; 1 Id. 157; 12 Id. 367. And in 16 Johnson, 301, it is said that "if one enter on land without any title or claim, or color of title, the law adjudges the possession to be in subservience to the legal owner; and no length of possession will render the holding adverse to the title of the owner; but if a man enter on land, without claim or color of title, and no privity exists between him and the real owner, and such person afterwards acquires what he considers a good title, from that moment his possession becomes adverse:" 18 Johns. 44, 355.

When a man enters into land under a deed or extent, or as heir to another, such entry will give him possession of all the land which the title under which he enters embraces; because he is presumed to enter, claiming according to his title. The bounds of his possession will be marked by the lines and monuments mentioned in his deed or extent, or by the deed or possession of his ancestor. For this purpose it is immaterial whether the title under which he enters be a valid one or not: 4 Mass. 418; *Jackson v. Wheat*, 18 Johns. 40. But when a man enters into land without title, or color of title, the law furnishes him with no intendment to extend his possession beyond his actual occupation. As he is a stranger to the title, the law considers him a stranger to all the lines and monuments which relate to the title; whatever may be the extent of his claims of possession, the law deems him in possession of so much only as he actually occupies.

In the case of the *Proprietors of the Kennebeck Purchase v. Springer*, 4 Mass. 418 [3 Am. Dec. 227], Parsons, C. J., says: "When a disseisor claims to be seised by his entry and occupation, his seisin cannot extend farther than his actual exclusive occupation. In order to bar the recovery of a plaintiff who has title by a possession in the defendant, strict proof has always been required, not only that the first possession was taken under a claim hostile to the real owner, but that such hostility has existed on the part of succeeding tenants. It is also necessary that such possession should be marked by definite boundaries:" Spencer, J., in *Brandt v. Ogden*, 1 Johns. 157; 2 Id. 23, h. 234; 10 Id. 477. These are cases, it is true, where possession was set up in opposition to the legal title. But we apprehend that in all cases where a party relies upon naked possession as evidence of title, his claims must be considered

as bounded by his actual occupation. Thus, where a lot is divided by fences into several inclosures, and entry and occupation of one inclosure, claiming the whole lot, give no possession of any other inclosure to a man who enters without color of title. There is no doubt that naked possession may be evidence of title: 2 Johns. 24; 10 Id. 355; *Allen v. Bixington*, 2 Saun. 111; *Bateman v. Allen*, Cro. Eliz. 437; 16 Johns. 317. But from the nature of the case, naked possession must be actual possession. The constructive possession which the law annexes to a title cannot exist in such a case. There can be no constructive naked possession. An entry upon part of a lot of land claiming the whole, without color of title, gives no possession of any part except that upon which entry is made. If it could, an entry upon a part of a lot might give actual possession of all the land in a town or county.

We have taken a much broader view of the law, relative to the possession of land, than is absolutely necessary for the decision of the present case. But it seemed to us useful, to consider the nature of that possession which follows title, in order that the difference between that and naked possession, or possession without title, might be more distinctly seen. The application of the law on this subject, to the case now before us, is very easy. Riley entered upon the land east of the river, previous to the entry of the defendant upon the land west of the river; and he entered, claiming the whole lot. But there was no pretense, that he entered, even under color of title, or that he was ever upon the land west of the river, previous to the entry of the defendant. It is clear, then, that his naked possession of the land east of the river, accompanied with a claim of the whole lot, did not, in law, give him possession of that part of the lot which lies west of the river, and this objection must be overruled.

There is another objection in this case, to the instructions which were given to the jury, which must be examined. They were told that although the defendant, when he entered upon the land, was only fourteen years old and was living in his mother's family, he must be presumed to enter in his own right, unless the contrary appeared. There is no doubt that a minor may take land by purchase, and by descent: Co. Lit. 2, b. *Parker v. Lincoln*, 12 Mass. 16; Comyns's Digest, *Enfant*, B. 1. It is equally clear, that by an actual entry upon land, an infant may disseize the owner: Litt. secs. 407, 408; Perkins, 3, 47; Co. Litt. 180, b., note 56. Whether an infant living with his

father, and entering upon land, must be presumed to enter in his father's employment, need not be decided in the present case. Some have been of opinion, that a father is bound to support his minor children, even when they have sufficient property to support themselves, provided he be of sufficient ability: *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Id. 97. And it is clear, that so long as a father is bound to support his minor children, he is entitled to their services: *Benson v. Remington*, 2 Mass. 113; *Day v. Everett*, 7 Id. 145. But even a father has nothing to do, as natural guardian, with the land of his children: *May v. Calder*, 2 Mass. 55; Co. Litt. 88, b., note, 66. But a mother stands on different ground from a father in respect to her children. She is bound to support her children only when she is of sufficient ability, and they stand in need of relief: *Dawes v. Howard*, 4 Mass. 97; *Whipple v. Dow*, 2 Id. 415; *Cooper v. Martin*, 4 East, 76; *Freto v. Brown*, 4 Mass. 675; *Wilks v. Rogers*, 6 Johns. 566; *Commonwealth v. Murray*, 4 Binn. 487 [5 Am. Dec. 412]. While a mother actually supports her minor children at her own expense, she is entitled to their services, and they may, perhaps, be presumed to be in her employment. But in the present case it did not appear, that the mother maintained the defendant at her own expense. He may have had property sufficient to maintain him; and the mother may not have been of sufficient ability to maintain her children. There is then no ground to presume from the circumstance, that the defendant lived with his mother, that he took possession of the *locus in quo* in her right. There was no evidence that she had any color of title. We are, therefore, of opinion, that as the defendant took possession of the land previous to any entry on the part of the plaintiff, the defendant had a right to retain the possession, until the plaintiff showed a right to the possession; and that the defendant is entitled to judgment on the verdict.

WIDOWED MOTHER'S RIGHT TO CHILD'S SERVICES.—The statement here made, *arguendo*, that "a mother stands on different ground from the father in respect to her children," so far as her right to their services is concerned, is disapproved in *Hammond v. Corbett*, 50 N. H. 501, where it was held, upon mature consideration, and after a careful examination of the authorities, that a widowed mother is entitled to the services and earnings of her child, if such child be unemancipated, and is not under guardianship in the same manner, and to the same extent, as the father would have been. And this is now the prevailing doctrine in this country, although there is much disagreement in the cases on this point: See note to *Coon v. Moffett*, 4 Am. Dec. 405; and see *Commonwealth v. Murray*, 5 Id. 412, and *Logan v. Murray*, 9 Id. 422, denying that the mother has such right. The doctrine of the prin-

cial case on this point is in accordance with that laid down in 1 Bl. Com. 453, and in Schouler Dom. Rel. 348, and in many of the earlier decisions.

EXTENT OF ADVERSE POSSESSION.—It is clear law that where one enters upon land without title or color of title, there can be no constructive possession, but the possession is a mere *possessio pedis*, bounded by the extent of the actual beneficial occupancy: *Hall v. Povel*, 8 Am. Dec. 722; and see the note to *Taylor v. Buckner*, 12 Id. 357; see, also, *Ferguson v. Kennedy*, *post*, and note.

SMITH v. HUNTINGTON.

[3 NEW HAMPSHIRE, 75.]

REPLEVIN FOR GOODS TAKEN ON MESNE PROCESS, does not lie.

REPLEVIN for certain cows. The defendant avowed the taking from the plaintiff's possession, as deputy sheriff, on an attachment in favor of one Stone, and against one Pulsifer. The validity of the writ of attachment being admitted, a nonsuit was directed, subject to the opinion of the court as to whether replevin lies in any case for property seized on valid mesne process.

Bell, for the plaintiff.

Smith, for the defendant.

By Court, RICHARDSON, C. J. The question which this case presents for our decision is, whether replevin can be maintained in any case, for goods which have been seized by virtue of valid mesne process? If the process, by which goods are seized, is void, there is no doubt that replevin lies: *Mills v. Martin*, 19 Johns. 7; *Mariott v. Shaw*, Comyns's Rep. 274. And if replevin lies in any case where the goods are seized upon mesne process, it lies in favor of this plaintiff; for the goods were taken by virtue of a writ, which ran not against his goods, but the goods of a third person, and they were taken from the possession of the plaintiff.

It has been decided in New York, that replevin lies for goods taken upon execution, if taken from the possession of the plaintiff in replevin, by virtue of an execution running against another person; *Thompson v. Button*, 14 Johns. 84. But in the case of *Eastman v. Molony*, Strafford, February term, 1822, we decided that replevin would not lie in such a case, in this state. It is, therefore, to be considered as settled here, that replevin lies in no case where goods have been taken by virtue of a valid execution.

The question then is, whether there be any distinction between mesne and final process which can sustain this action.

It has been urged, by the plaintiff's counsel, that it has always been the understanding of the members of the bar, in all the counties, that replevin might be maintained in a case like this; and there is no doubt that it has been often sustained. This argument is certainly entitled to consideration; but it must be recollected that it is not many years since it was generally understood that replevin might be maintained for goods taken upon execution. As soon, however, as the attention of the court was called to the subject, it was at once decided that it would not lie in that case. And it seems to us that if replevin cannot, in this instance, be sustained upon principle, it ought not to be sustained by usage. Where long usage, however erroneous, has become the foundation of the title to property, "the law so favors the public good, that it will permit a common error to pass for right." But it is never too late to correct an error in the application of a remedy; because the right remains unaffected by the change. Besides, if replevin be a proper remedy where goods are taken upon mesne process, it can be sustained only in cases where the goods of one man are taken by virtue of process against another. No one can maintain replevin for goods taken by valid process against himself; because in such case, the taking must be deemed lawful. If, then, we hold that replevin may be sustained upon the facts in this case, the principle cannot be extensively applied in practice, nor be in any view of much importance.

It is said that, upon process against one man, the officer may take the goods of another, who would not, for any consideration, part with the particular articles taken, and that in such a case, replevin would be a direct and speedy remedy; and this is true. But, if in any particular case no arrangement could be made between the owner of the articles and the officer, until the question as to the right of the property was settled, still the owner would not be without an adequate remedy; for he might purchase the articles, when exposed for sale by the officer, and recover the amount he might then be compelled to pay, in an action of trespass or trover; and if the attachment should in any way be dissolved, and the goods not sold, replevin would then lie if the goods were not returned. Indeed, it does not seem to us that there is any pressing necessity which can justify us in sustaining the action in this instance, if it cannot be sustained by the principles of the common law.

The rule of the common law is, that replevin does not lie of goods in the custody of the law. In the case of *Isley v. Stubbs*, 5 Mass. 283, Parsons, C. J., says: "Chattels in the custody of the law, cannot at common law be replevied as goods taken by distress, upon a conviction before a justice, or goods taken in execution. And by parity of reason, goods attached by an original writ, as security for the judgment, cannot be replevied;" and he says that a statute of Massachusetts, which gives replevin where goods have been attached, has been productive of much practical inconvenience.

It is believed that no case can be found, except the case of *Thompson v. Bulton*, 14 John. 84, where replevin has been held to lie at common law, of goods in the custody of the law: Co. Lit. 145, b.; *Pangburn v. Partridge*, 7 John. 140 [5 Am. Dec. 250]; 1 Chitt. Pl. 159; Bull. N. P. 53; *Gardner v. Campbell*, 15 John. 401; Willes's Rep. 672, note; 2 Strange, 1184; *Pritchard v. Stevens*, 6 T. R. 522; *Fletcher v. Wilkins*, 6 East, 283.

It is said, that a distress impounded cannot be replevied, because it is in the custody of the law: *Hammond*, 376; Co. Lit. 47, b. But this is altered here by a statute, which expressly gives replevin in such a case: 1 N. H. Laws, 413. And we are of opinion that, until the legislature shall see fit to give a replevin of goods attached, no such suit can be sustained.

Judgment upon the nonsuit.

PLUMER v. HARPER.

[3 NEW HAMPSHIRE, 88.]

GRANTOR'S LIABILITY FOR CONTINUANCE OF NUISANCE.—A grantor of land, who has erected a nuisance thereon, whereby an adjacent land-owner is damaged, is liable for the continuance of such nuisance, notwithstanding his conveyance.

ACTION on the case for maintaining and continuing a dam across a certain creek, from July, 1821, to August, 1822, whereby plaintiff's land was flooded and injured. Plea, the general issue. It appeared that the defendant erected the dam in 1818, but that in 1820, he had, by a deed in fee, conveyed the land on which it stood to one Harper, who had ever since been in possession, although the defendant had occasionally occupied the mills connected with the dam under said Harper, and so occupied them between July, 1821, and August, 1822. Verdict for the plaintiff, subject to the opinion of the court upon these facts.

Walker, for the plaintiff

Lyford, for the defendant, contended that the action would not lie against the defendant, because he had no possession or interest in the premises, and could not enter to abate the nuisance; and that, although case was substituted for the ancient remedies of *quod permittat* and assize of nuisance, it was but a change in the name and not in the law; and that the action, like those remedies, would lie only against parties in possession and in favor of parties in possession, and on these points he cited 3 Salk. 248; 1 Chit. Pl. 77; 1 Bos. & P. 404; 3 Bl. Com. 222; 9 Co. 53; 5 Id. 101; 6 T. R. 441.

By Court, RICHARDSON, C. J. It is contended on the part of the defendant in this case, that he is not liable for the injury of which the plaintiff complains, because previous to the time mentioned in the declaration, he conveyed the land upon which the nuisance had been erected to a third person; and so the continuance of the nuisance must be deemed not his act, but the act of such third person; and the question is, whether the defendant is liable for the continuance of the nuisance, after having parted with his title to the land? He who is injured by a nuisance may enter and abate it, or he may have redress by an action: *Baten's case*, 9 Coke, 53; *Penruddock's case*, 5 Id. 101; *Rex v. Rosewell*, 2 Salk. 459.

In ancient times, the remedy by action for a nuisance was a *quod permittat*, or an assize of nuisance. In both these actions, the plaintiff had judgment, not only for his damages, but for the abatement of the nuisance: *Baten's case*, 9 Coke, 53. But at the common law, an assize of nuisance was held to lie only against him who erected the nuisance, and not against him to whom tenement had been transferred. The reason assigned for this was, that there was not found in the register any form of writ, in which it was not supposed that the tenant erected the nuisance. The defect was remedied by the statute of Westminster 2, cap. 24, which made him liable to whom the person erecting the nuisance had conveyed the tenement. This statute was construed to give an assize against him who erected, and him who continued a nuisance jointly; and the form of the writ is given in *Baten's case*, 9 Coke, 53. It is, therefore, clear that in Lord Coke's time it was held that he who erected a nuisance, and then conveyed the tenement, remained liable after the conveyance for any damage resulting from the continuance of the nuisance.

In the reign of Queen Elizabeth, the *quod permittat* and assize began to go out of use, and an action on the case to be brought for a nuisance; and in the thirty-sixth year of that reign, the case of *Beswick v. Combden*, was decided in the king's bench: Moor, 353; Cro. Eliz. 402. The facts are stated differently by the two reporters. It was an action on the case, and Croke says that the defendant erected the dam, which caused the water to overflow the land of J. S., who enfeoffed the plaintiff; and the question was, whether the feoffee could maintain case for the continuance of the nuisance? But Moor says that the nuisance was erected by one, who enfeoffed the defendant, and that the question was, whether the feoffee was liable in case for the continuance of the nuisance? Whatever the facts may have been, both Croke and Moor agree that the plaintiff had judgment. But two years afterwards, in the case of *Beswick v. Combden*, in the court of common pleas, which was an action on the case for the continuance of a nuisance, the action was held not to lie; because the proper action was an assize, or a *quod permittat*, and not a case; and because the defendant could not be liable for permitting a nuisance to continue.

Penruddock's case, 5 Coke, 101, was a *quod permittat* in the common pleas brought by the grantee of him to whose prejudice the nuisance was originally erected, against the grantee of him who first erected the nuisance; and the question was whether the defendant was liable; and it was held that he was, he having continued the nuisance after he had been requested to abate it. Notwithstanding the decision of the common pleas, case seems after this time to have maintained its ground, and the other two remedies have gone wholly out of use. The case of *Ryppon v. Bowles*, Cro. Jac. 373, was an action on the case. The facts were that one Thomas Henson erected a building by which the plaintiff's window was darkened. Afterwards Bowles, the defendant, being in possession, the plaintiff brought an action against him for continuing the nuisance: Coke, C. J., inclined to the opinion that the defendant was not liable; but all the court held that he who erected the nuisance was liable.

In *Brunt v. Haddon*, Cro. Jac. 555, the case was, that one Quarles had a mill, and erected a dam which caused the water to overflow the plaintiff's land; Quarles leased the mill to Haddon, against whom the plaintiff brought his action for continuing the nuisance, and Haddon was held to be liable. In *Rosewell v. Prior*, 2 Salk. 460; 1 Ld. Raym. 713, it was decided

that where a tenant for years erected a nuisance, for which an action was brought against him and a recovery had, and he then underlet to another, an action might still be maintained against him who erected it for the continuance of the nuisance. Upon an examination of the cases bearing upon the question now to be decided, it will be found that although in the lapse of time the form of action has entirely changed, yet the books indicate no change in the liability of the wrong-doers. No case is to be found in which it has been doubted that he who erects a nuisance continues liable as long as the nuisance continues. But it has often been made a question how far, and under what circumstances, he who adopted the acts of the original wrong-doer shall be liable.

If the question which this case presents were now to be decided for the first time, it seems to us that it would be very difficult to find a good reason why the original wrong-doer should be discharged by conveying the land. The injury has no connection with the ownership of the land. If A. enter into the land of B., and there erect a dam, which causes the water to overflow B.'s land, there can be no doubt that he will be liable for any damage resulting from such overflowing. So if A. enters B.'s land and there erects a nuisance to the prejudice of C., it is clear that A. will be liable to C. When he who erects the nuisance conveys the land, he does not transfer the liability to his grantee. For it is agreed in all the books that the grantee is not liable until, upon request, he refuses to remove the nuisance. It does not make the original act less injurious because the grantee adopts it; and we are not aware that in any action against an individual for a tort it can be a good defense to show that a third person has assented to the wrong, and thus become liable.

We are, therefore, of opinion that the objection which has been raised in this case cannot prevail, and that there must be judgment on the verdict.

LIABILITY OF ERECTOR OF NUISANCE.—Upon the plainest principles of justice one who erects a nuisance is liable to the injured party for its direct consequences so long as it continues. While it is true that "every continuance of a nuisance is a fresh nuisance," *Dorman v. Ames*, 12 Minn. 451, the better doctrine is that the injury is not divisible so far as the original wrong-doer is concerned. As to him the mischievous consequences directly resulting from the erection should be presumed to flow from his act in making it. Therefore—

HIS LIABILITY IS NOT TERMINATED BY ALIENATION of the land upon which the nuisance was erected. Responsibility for a private wrong of this kind

is no more transferable or assignable by the mere act of the wrong-doer, than liability for any other tort. Hence, as held in the principal case, where the owner of land erects upon it a nuisance to the injury of his neighbor, and then parts with the land, he remains liable, not only for the previous damage but also for that which may afterwards result from the erection, so long as it continues. This is well settled in New Hampshire. "The doctrine of the cases in this state and elsewhere is, that he who erects a nuisance does not, by conveying the land to another, transfer the liability for the erection to the grantee, and the grantee is not liable until upon request, he refuses to remove the nuisance, for the reason that he cannot know until such request, but the dam, which was the nuisance complained of, was rightfully erected; and there can be no injury in holding to this doctrine, as the original wrong-doer continues liable, notwithstanding his alienation: *Plumer v. Harper*, 3 N. H. 88; *Woodman v. Tufts*, 9 Id. 91; *Curtice v. Thompson*, 19 Id. 471; *Carleton v. Redington*, 21 Id. 291; *Snow v. Cowles*, 22 Id. 296; *Waggoner v. Jermaine*, 3 Denio, 306; *Johnson v. Lewis*, 13 Conn. 303; 1 Chit. Pl. 83;" *Eastman v. Amoskeag etc. Co.*, 44 N. H. 143. In that case there had been an alienation not only of the land upon which the nuisance was erected, but also of that which was injured thereby. See, also, Wood's Law of Nuisances, sec. 827; 1 Hilliard on Torts, 601. The liability in such cases does not spring from the ownership of the land on which the nuisance exists, but from the doing of the act which occasions the injury. "It is not necessary in an action of this nature, that a person charged with erecting the nuisance should be the owner of the freehold, or any part of it, on which the dam is erected; it is sufficient if he is a party to the erection of the obstruction claimed to be a nuisance. * * * The erection of the obstruction is sufficient to constitute a liability." *Dorman v. Ames*, 12 Minn. 451. In that case it was doubtful whether one of the defendants had any interest in the land upon which the dam, which occasioned the injury, was erected. So it is held that the liability of one who erects a nuisance, for its continuance, is not diminished by the fact that he cannot enter to abate it: *Smith v. Elliott*, 9 Pa. St. 345; *Fish v. Dodge*, 4 Denio, 317. As where the nuisance was erected on land which the defendants did not own: *Thompson v. Gibson*, 7 Mees. & W. 456. It is clear, however, that where the grantee of land upon which an obstruction exists, makes a change in it which occasions injury, the grantor is not liable: *Carleton v. Redington*, 21 N. H. 291. For in that case the grantee is the original wrong-doer.

WHETHER NATURE OF CONVEYANCE AFFECTS LIABILITY.—If the view which we have taken of this subject is correct, the liability of one who has erected a nuisance upon his land, for injuries resulting from it after he has parted with the land, is not varied by the nature of the transfer, whether it be by lease, quitclaim deed, conveyance with warranty, or otherwise; and the cases above cited do not proceed upon any such distinction. The erector of the nuisance is held liable for its continuance simply because he erected it without reference to the fact whether he has any interest in maintaining it or not. Hence it cannot matter whether he conveys the land at all, or how he does so. But a different doctrine seems to be established in New York. It is there held, in a number of cases that where one who has erected a nuisance upon his land afterwards parts with the land, he is not liable for injuries resulting from the continuance of such nuisance unless he is interested in maintaining it, either because he receives rent or because he has inserted in his conveyance some covenant which will be broken if the nuisance is abated. The doctrine is thus stated by Bronson, J., in *Mayor of Albany v.*

Cunliff, 2 N. Y. 174: "A party who has erected a nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land; but it is only when he continues to derive a benefit from the nuisance, as by demising the premises and receiving rent: *Roswell v. Prior*, 2 Salk. 460; 1 Ld. Raym. 713; *Blunt v. Aikin*, 15 Wend. 522, or where he conveys the property with covenants for the continuance of the nuisance: *Wagoner v. Jermaine*, 3 Denio, 306." And this doctrine is approved in *Hanse v. Cowing*, 1 Lana. 238, and *Chenango Bridge Co. v. Lewis*, 63 Barb. 111. On the authority of these cases the liability of the erector of a nuisance is stated with the same qualification in Wood's Law of Nuisances, sec. 827, and 1 Hilliard on Torts, 601. This distinction probably grew out of the fact that in the ancient proceeding by assize of nuisance and in the writ *quod permittat prosternere*, mentioned in the principal case, a part of the remedy sought against the defendant was the abatement of the nuisance, which could be had only where the party had some active agency in maintaining it. But it is difficult to see why there should be any such distinction where the remedy is merely an action for damages. It seems to make the liability depend not upon the fact that the erection is injurious to the plaintiff, but upon the fact that its continuance is beneficial to the defendant. Under this view of the law one may go upon land and erect a nuisance, and escape responsibility by abandoning the premises the next day on the absurd pretense that it is not the erection, but the continuance of it, that works the mischief, and that he has no interest or agency in its continuance; leaving the injured party to find out the owner of the land and to seek a remedy against him after notifying him to remove the nuisance. Surely one who has erected a mischievous obstruction which injures an adjacent land-owner ought not to be permitted thus to shuffle off his liability by separating his act from its necessary consequences. Nor should the injured party be driven to a nice calculation of the extent of the wrong-doer's interest in the land, or to a search for covenants in the deed by which he has conveyed it before bringing an action against him.

GRANTEE'S LIABILITY FOR CONTINUING NUISANCE.—It is well settled that a grantee or lessee of land upon which a nuisance has been erected is liable for its continuance: *Cobb v. Smith*, 38 Wis. 21; *Eastman v. Amoskeag Co.*, 44 N. H. 143, and cases cited; *Dorman v. Ames*, 12 Minn. 451; *Tate v. Missouri etc. R. R. Co.*, 64 Mo. 149; *Vedder v. Vedder*, 1 Denio, 257; *Brown v. Cayuga etc. R. R. Co.*, 12 N. Y. 436; *Irvine v. Wood*, 51 Id. 224.

NOTICE TO REMOVE WHEN NECESSARY.—It is clear that one who erects a nuisance is not entitled to notice to remove it before bringing the action against him: *Ray v. Sellers*, 1 Duv. 254; *Slight v. Gutzlaff*, 35 Wis. 675; *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573. This is so, because being the original doer of the act, he is presumed to have intended the ordinary and natural consequences of it. But as to a grantee of land upon which a previous owner has erected a nuisance, the case is otherwise. He is not responsible merely because he is the owner of land upon which there is a nuisance. His liability arises from his voluntary continuance of the nuisance. Not having been a participater in the original wrong, there is no presumption against him of an intention to do the injury, or of a knowledge that there is any injury. He becomes liable only by knowingly adopting and approving the wrong, which will not be presumed, unless he refuses to abate the nuisance after notice. The overwhelming weight of authority, therefore, is in favor of the position that no action will lie against him for merely continuing the erection, which constitutes the nuisance, in its orig-

inal state, unless he has notice to abate it, and such notice is alleged: *Woodman v. Tufts*, 9 N. H. 91; *Snow v. Cowles*, 22 Id. 296; *Johnson v. Lewis*, 13 Conn. 303; *Thompson v. Smith*, 11 Minn. 15; *Pillsbury v. Moore*, 44 Me. 154; *Pierson v. Glean*, 14 N. J. L. (2 Green), 36; *Beavers v. Trimmer*, 25 Id. (1 Dutch.), 97; *Slight v. Gutslaff*, 35 Wis. 675; *West v. Louisville etc. R. R. Co.*, 8 Bush, 404; *McDonough v. Gilman*, 3 Allen, 264; *Dodge v. Stacy*, 39 Vt. 558; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573; *Pinney v. Berry*, 61 Mo. 359.

And this is so, notwithstanding the fact that he may have made repairs upon the erection constituting the nuisance, so long as such repairs do not render it more noxious than it was when it came to his possession: *McDonough v. Gilman*, 3 Allen, 264. But not so where there is fresh injury resulting from some act of his. This distinction is very clearly pointed out by Redfield, J., in *Norton v. Valentine*, 14 Vt. 239. In that case the original owner of the defendant's land had constructed a raceway, diverting the water of a natural stream which crossed adjacent land of the plaintiff but returning it again to the natural channel before coming to the plaintiff's land. Below the point where the water was diverted, the original stream was divided and ran in two channels, only one of which crossed the plaintiff's land. When the raceway was originally made, the channel crossing the plaintiff's land was filled up some distance below the point of diversion, and this was the condition of the premises when the defendant became the owner. The defendant, not having use for the water at all times, closed the raceway at intervals, and owing to the obstructions in the natural channel, already mentioned, the water was all thrown into the other channel, and the plaintiff's supply was cut off. An action having been brought for this injury, the defendant claimed that the damage was occasioned by the obstruction in the natural channel made by the previous owner, and that he was entitled to notice to remove it. The court held, however, that the defendant was liable without notice, because his own act had caused the injury which would not have happened if he had continued to use the premises as they were when he received them.

A case in which the doctrine as to the necessity of notice seems to have been pushed to extremes, is *Ray v. Sellers*, 1 Duv. 254. There the nuisance complained of was that the defendant was depositing dead horses near the plaintiff's dwelling house. The defendant claimed that as the people of the neighborhood had long previously been in the habit of depositing carcasses in the same place, he was merely continuing a nuisance originated by others, and was, therefore, entitled to notice to abate it, before an action would lie against him, and the court so held. It is exceedingly doubtful whether the distinction between the originator and the continuer of a nuisance can be applied to a case such as this, where the injury complained of consists not in any permanent erection, but in the repetition of certain hurtful acts. It would seem to be more consistent with sound principles to hold the parties doing such acts, independently liable as original wrong-doers.

AS TO THE NATURE OF THE NOTICE to which a party is entitled who merely continues a nuisance erected by a previous owner, the decisions are not entirely in harmony. In many cases it is held that he must have special, distinct and unequivocal notice, coupled with a request to abate or remove the nuisance, and that mere knowledge of the existence and injurious nature of the nuisance will not suffice: *West v. Louisville etc. R. R. Co.*, 8 Bush. 404; *Beavers v. Trimmers*, 25 N. J. L. (1 Dutch.), 97; *McDonough v. Gilman*, 3 Allen, 264; *Johnson v. Lewis*, 13 Conn. 303. But the better opinion would seem to be that if he has knowledge that the nuisance exists, and that it is

the occasion of injury to the plaintiff, no express notice or request to abate is necessary: *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573; *Pinney v. Berry*, 61 Mo. 359; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. The doctrine is thus stated in *Pinney v. Berry*, 61 Mo. 359: "The better opinion seems to be that, in order to maintain an action for damages resulting from a nuisance on defendant's land, where such nuisance was erected by a previous owner before conveyance to defendant, it is necessary to show that before the commencement of the action, the defendant had notice or knowledge of the existence of the nuisance." Much to the same effect is the language of Temple, J., in *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. Delivering the opinion of the court, he says: "The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a nuisance, and a request must be made that it may be abated before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection. This rule is not inconsistent with the authorities cited by plaintiff's counsel, that every continuance of a nuisance is a new nuisance; but it is adopted for the reason that it would be a great hardship to hold a party responsible for consequences of which he may be ignorant." Indeed, in all the cases holding notice to the grantee necessary, it is put on the ground that it would be unjust to make him responsible for injuries resulting from an erection made by another, when he may be ignorant of their existence, without giving him previous notice, so as to enable him to abate the nuisance if he will; and, of course, if he is not ignorant, the necessity fails. He then stands on the same ground as the original wrong-doer.

CASES DENYING THE NECESSITY OF NOTICE.—Some able judges have expressed themselves very strongly against the doctrine that a grantee of land upon which a nuisance has been erected by a previous owner is entitled to notice before being made liable to an action for its continuance: See the opinion of Denio, J., in *Brown v. Cayuga etc. R. R. Co.*, 12 N. Y. 486, and the opinion of Strong, J., in *Hubbard v. Russell*, 24 Barb. 404. And in *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 52 Barb. 390, it was expressly adjudged that notice to a grantee to abate a continuing nuisance erected by another was unnecessary; but this decision was reversed by the court of appeals: *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 51 N. Y. 573. Manning, J., in delivering the opinion of the court in *Caldwell v. Gale*, 11 Mich. 77, very strongly combats the necessity of notice in such a case. After stating that it is universally conceded that the erector of a nuisance is not entitled to notice to remove or abate it, he says: "Now, why should there be this difference between one who erects a nuisance on his own land and his grantee, who afterwards sustains and upholds it? It is said that defendant may not have known that the dam was injurious to the plaintiff, or that his rights were impaired by it. The same may be said of the author of the nuisance; and if such a plea is not good in his mouth, why should it be in that of his grantee? The wrong is none the less a wrong, so far as it regards the injured party, because the wrong-doer intended no injury. Why is want of notice no excuse when coming from the author of the nuisance? Because it is a fundamental principle of law, that no man shall so use his own property as to injure another, by encroaching on his rights. We know of no exception to this rule, unless it be the one in question; and we see no reason why it should not, and does not, apply with all its force as strongly against the grantee as his grantor. But it is, or may be, further said, that the grantee may suppose his grantor has acquired the right to flow from the owner of

the land. He may suppose the same in regard to the title to the land purchased by him, but if his grantor had no title he would have none, and no notice would be necessary to sustain an ejectment to oust him of his possession. And so it seems to us in regard to the right to use the land in a way to injure another. If his grantor had not acquired the right to flow, he could not have it. It is as clearly his duty to look into the right of his grantor before purchasing, in the one case as in the other."

It must be conceded that these suggestions are not without weight. The reasoning seems, however, to be based somewhat on the notion that liability for such a nuisance is an incident of the ownership of the land upon which it is erected. But this is not the true ground. The owner of land is not liable for a nuisance placed thereon by other parties: *Maenner v. Carroll*, 46 Md. 193. The erector of a nuisance is liable because he erected it, and not because he owned the land; and he is not entitled to notice because he must be presumed to have foreseen and intended the consequences. The grantee does not become liable by simply becoming the owner of the premises. His mere passive ownership does not warrant any presumption of his knowledge of the injurious effects of an existing nuisance. He can only be made liable by becoming a voluntary participator in the wrong. His liability is not for erecting the nuisance, but for not abating it; and as he cannot be presumed to know or intend the consequences of an act done by another, actual knowledge must be brought home to him before he can be called on to remove the cause of the injury. Notice to him seems therefore to be required upon the plainest principles.

But where it is held, as in the New York cases above referred to, that the erector of a nuisance is not liable for its continuance after he has parted with the land, unless he is interested in its maintenance by receiving rent or by reason of covenants in his deed, there would seem to be stronger ground for not requiring notice to the tenant or subsequent owner before subjecting him to an action. Otherwise, from the time that the original wrong-doer quits possession until the subsequent owner or possessor can be discovered and notified, there is an interval during which there is no one liable for damages suffered by the injured party. The wrong continues, but there is no remedy. This was partly the ground upon which the court held in *Conhocton Stone Road v. Buffalo etc. R. R. Co.*, 52 Barb. 390, that notice to the subsequent owner was unnecessary, and it is certainly worthy of consideration. It at least affords additional reason for doubting the soundness of the position taken in the New York decisions that the erector of a nuisance is not liable for its continuance after alienation unless he has given covenants which will be broken by its abatement. No juggling with the possession should be permitted to deprive the injured party of his remedy for a single instant while the wrong continues. If the right of action against the original wrong-doer ceases at all, it ought not to cease until that against the subsequent owner begins.

KIMBALL v. WILSON.

[3 NEW HAMPSHIRE, 26.]

A RELEASE BY ONE OF SEVERAL PLAINTIFFS, in an action on the case in the nature of waste, is a good bar.

PLEADING RELEASE AFTER ACTION COMMENCED.—A general release after the commencement of the action need not be pleaded *puis darrein continuance*, where no prior plea has been filed; nor need it be pleaded in bar of the further maintenance of the action merely; but a plea of such release in bar generally is good.

COSTS ARE PRESUMED TO HAVE BEEN ADJUSTED by the parties where a general release by one of the plaintiffs is given pending the action; and as the plaintiffs are entitled to have the release pleaded, neither party can claim costs where the plea is adjudged sufficient.

ACTION on the case in the nature of waste. The declaration alleged that the plaintiffs and the defendant were tenants in common of certain premises, and charged the defendant, in substance with cutting down and carrying away certain trees of the value of eight dollars each, without the consent of the plaintiffs. The action was entered September term, 1821, and continued to February term, 1822, when the defendant pleaded that since the commencement of the action, to wit, on February 14, 1822, Ira Moore, one of the plaintiffs, by deed, etc., in court, etc., did agree with the defendant for and in consideration of fifty dollars paid, etc., he did thereby discharge and release all actions of trespass, or trespass on the case, or any and all actions commenced by the plaintiffs in the superior court of judicature against the defendant; wherefore he prayed judgment whether the plaintiffs ought to have and maintain said action. The plaintiffs demurred to the plea assigning for cause, that the matter thereof should have been pleaded *puis darrein continuance*, and also that it should have been pleaded in bar of the further maintenance of the action and not in bar generally.

Mason and Sullivan, for the plaintiffs, contended: 1. That a release by one of the co-tenants was no bar to the action; 2. That the release should have been pleaded *puis darrein continuance* and in bar of the further prosecution of the suit, and not in bar generally, citing 1 Chit. Pl. 531, 634.

S. D. Bell, for the defendant, insisted: 1. That the release was a bar to the action: *Ruddock's Case*, 6 Co. 25; Shep. Touch. 335; *Pierson v. Hooker*, 3 Johns. 68 [3 Am. Dec. 467]; *Austin v. Hall*, 13 Id. 286 [7 Am. Dec. 376]; Lit., sec. 315; Co.

Lit. 198; 3 Bac. Ab. 706; *Daniels v. Daniels*, 7 Mass. 137; 2. That a release pending the action could be pleaded generally in bar: *Prier v. Kenrick*, Fortes. 338, cited 5 Bac. Ab. 479; and 1 Com. Dig., Abatement I, 24, p. 98; Rast. Ent. 503; *Austin v. Hall*, 13 Johns. 286 [7 Am. Dec. 376]; *Everenden v. Beaumont*, 7 Mass. 76; *Lebret v. Papillon*, 4 East, 502; Syst. Plead. 406; 4 Bro. tit. Cont. 31. So in analogous cases of pleas of outlawry, etc.: *Moor v. Green*, 1 Salk. 178; S. C., 5 Mod. 11, approved Com. Dig., Abatement I, 24, p. 98; *Sullivan v. Montague*, Doug. 110; *Tillotson v. Preston*, 3 Johns. 229; *Thomlinson v. Arriskin*, Com. 328; *Jewett v. Jewett*, 5 Mass. 275; *Andrews v. Gallison*, 15 Id. 325; 1 Chit. Pl. 531; *Evans v. Prosser*, 8 T. R. 186; *Jackson v. Rich*, 7 Johns. 194; Lawes Pl. in Assumpsit, 666; *Story v. Bloxham*, 2 Esp. 504; *Savage's Case*, 1 Salk. 291; *Bird v. Randall*, 3 Burr. 1345; *Baylies v. Fettyplace*, 7 Mass. 334; *Poor v. Robinson*, 10 Id. 131; 3. That such plea might be joined with the general issue: 1 Tidd. 610; 1 Chit. Pl. 542; Com. Dig., Plead. G. 2; *Austin v. Hall*, 13 Johns. 286 [7 Am. Dec. 376]; *Thomlinson v. Arriskin*, Com. 328; *Everenden v. Beaumont*, 7 Mass. 76; *Tillotson v. Preston*, 3 Johns. 229; *Lebret v. Papillon*, 4 East, 502; 3 Went. Pl. 137; 3 Ins. Cler. 269; 4. That this plea was not a plea *puis darrein continuance*, no former plea having been entered, and was not a waiver of the general issue, because pleaded at the same time: *Jackson v. Rich*, 7 Johns. 194; 1 Chit. Pl. 634; 5 Bac. Ab. 477, 478, 479; *Tillotson v. Preston*, 3 Johns. 229; Lawes Pl. in Assumpsit, 666, 716; 1 Com. Dig., Abatement I, 24; 2 Tidd. 774; 3 Bl. Com. 316; 5. That only pleas *puis darrein continuance* need be pleaded in bar of the further maintenance of an action: Com. Dig., Abatement I, 24; 6. That the court should give such judgment as would be proper on the whole case, without regarding any imperfection in the prayer for judgment: *Lebret v. Papillon*, 4 East, 502; *Dive v. Manningham*, Plowd. 66, 69; *Francis' case*, 8 Co. 93; *Westlie v. King*, Winch. 75; *Kirk v. Novell*, 1 T. R. 125; *Street v. Hopkinson*, 2 Str. 1055; *Powell v. Fullerton*, 2 Bos. & P. 420; 2 Saund. 210 d. n. 1.

By Court, RICHARDSON, C. J. It is contended that a release by one of these plaintiffs is not a bar to this action; and we shall dispose of this question in the first place, before we proceed to examine the objections, which have been made to the form of the plea. It is an old rule of law, that, where several join in a personal action to charge a defendant, the release of one is a bar to all. Thus, if two join in an action of debt, trespass, and the like, the release of one is a good bar to the action:

Shep. Touch. 335; *Ruddock's case*, 6 Coke, 25; S. C. Cro. Eliz. 648, S. C.

But, if divers defendants be charged in an action, and they, for the discharge of themselves, join in an action, in this case the release of one shall not bar the others: Shep. Touch. 335; 6 Coke, 25. Thus if judgment be rendered against several defendants, and they join in a writ of error to reverse the judgment a release of error by one is no bar. If, however, judgment has been rendered against several plaintiffs, and they join in a writ of error, the release of one is a bar to all: *Haskel v. Herne*, 3 Mod. 134; Bacon's Abr. "Release" G. In *Austin v. Hall*, 13 John. 286 [7 Am. Dec. 336], it was decided, that where several plaintiffs must join in an action, as in trespass *quare clausum fregit*, a release by one was a bar to the action. And in *Daniels v. Daniels*, 7 Mass. 135, it was decided, that tenants in common and joint tenants must join in an action for the destruction of their title deeds.

In waste, brought by two in the *tenuit*, the release of one bars both: 2 Coke, 68; Comyns' Digest "Pleader," 3 O. 16. But when waste is brought in the *tenuit* by two, the release of one bars only himself: 2 Inst. 307. The ground of distinction is this, where several join in a personal action, a release by one bars all, but if the personalty be mixed with the realty, it is otherwise: 2 Coke, 68. Waste in the *tenuit* lay against one, whose estate in the place, where the waste was, had expired, so that nothing except damages could be recovered. But in waste in the *tenuit*, which lay against one, whose estate had not expired, not only damages, but the place wasted, was recovered: 2 Saund. 234, note, 1; Comyns's Digest "Pleader," 3 O. 22.

It is also a rule of law, that in personal actions, the nonsuit of one is the nonsuit of all the plaintiffs; although the rule is otherwise in real and mixed actions: Bacon's Ab. "Nonsuit," E.; 10 Mass. 179; 5 Id. 411. These principles are easily applied to the case now before us. This is an action on the case, in the nature of waste; and although it can be maintained only in case an injury has been done to the inheritance: *Martyn v. Knowllys*, 8 T. R. 145, still it is a personal action, and must be governed by the general rule, that a release by one plaintiff in a personal action bars all.

It is also objected, that the plea in this case wants form, because the release is not pleaded strictly as matter arising *puis darrien continuance*, but only as arising after the commencement of the action. If, after a plea has been filed, new matter of

defense arises, it must, without doubt, be pleaded strictly as arising *puis darrein continuance*. In such a case it seems by the books, that courts have always held the defendant with much strictness to state the terms, from which, and the term, to which, the action was continued, and that the matters arose after the last continuance. The reason why, in England, so much strictness has prevailed, in relation to pleas *puis darrein continuance*, is probably, that it was intended to prevent the filing of them at *nisi prius*, to obtain delay. And we here adopt the same rules with regard to such pleas, with the same object. But, when the matter of such a plea is in the first instance pleaded in bar, before any other plea has been filed, we imagine that the plea may be in the form, which has been adopted in this case. In such a case, we apprehend, that the reasons, upon which the rules relating to pleas *puis darrein continuance* are founded, do not exist, and that it is sufficient, if the matter be alleged to have happened after the commencement of the action.

It is further urged, that the matter of the plea, in this case, ought to have been pleaded in bar of the further maintenance of the action, and not generally in bar. It is a general rule, that when matter of defense arises, after the commencement of the action, it shall be pleaded only in bar of the further maintenance of the suit, and the reason of this rule seems to be that, as the action must be presumed to have been rightfully commenced, such matter can, in its nature, be an answer only to the further prosecution of it. And it seems that in England, when matter arises after the commencement of the action is used as a defense, the plaintiff is entitled to costs up to the time when the matter of the bar arose. At least, the remarks of the court and of the counsel in *LeBret v. Papillon*, 4 East, 507; and in *Harris v. James*, 9 Id. 89, seem strongly to indicate this.

But when a general release is given, after the commencement of the action, the presumption is, unless the contrary appear, that the costs have been adjusted between the parties; and we are of opinion that such a release forms an exception to the general rule, and may be pleaded in bar generally.

And it is the opinion of the court that, in this case, neither party is entitled to costs. It must be presumed that the costs were adjusted when the release was made: *Watson v. Depeyster*, 1 Cai. 66; *Johnson v. Brannan*, 5 Johns. 268; *Shaw v. Wilmerden*, 2 Cai. 380; *Merchant's Bank v. Moore*, 2 Johns. 294; 1 Cai. 116; *Hart v. Story*, 1 Johns. 142.

If Moore, who made the release, had been the sole plaintiff,

and had endeavored to prosecute the suit, notwithstanding the release, perhaps the defendant might have been entitled to the costs of resisting such an attempt. But the release in this instance, was by one of several plaintiffs, and may have been made without the knowledge or consent of those who did not execute it; and when a release by one of several plaintiffs is taken under such circumstances, we think that the plaintiffs may put the defendant to plead his release without subjecting themselves to costs. The plea is adjudged sufficient, but no costs are allowed to either party.

NEW IPSWICH W. L. FACTORY v. BATCHELDER.

[3 NEW HAMPSHIRE, 190.]

RACEWAY APPURTENANT TO MILL.—Where one conveyed a moiety of certain land with a mill thereon, and with one half of all "water privileges" and "other privileges annexed," etc., and there was a raceway running from said mill over other land of the grantor, which had been used for a number of years, and was necessary for the convenient use of the mill, it was held that a right to the uninterrupted flow of the water in said raceway passed as appurtenant to the mill.

TRESPASS on the case for erecting a certain dam, causing the water to flow back upon and obstruct the plaintiffs' water wheel. Plea, the general issue. It appeared that the plaintiffs and the defendants were respectively owners of two adjacent closes through which ran the river Souhegan, upon which the plaintiffs had erected their factory; the site of said factory having been occupied as a mill seat since 1788, since which time there had been a raceway running from the mills there located over the land now owned by the defendants, to carry the water from said mills back into the river. Both the plaintiffs' and the defendants' closes formerly belonged to one Charles Barrett, from whose heirs the defendants derived their title. In 1804, the said Barrett being seized of both closes, conveyed to one Robbins, one undivided moiety of the close now owned by the plaintiffs, together with "one half of all the water privileges, and all other privileges annexed or belonging to said premises." The plaintiffs derived their title to said moiety from Robbins. The dam complained of was erected by the defendants on their land, below the mouth of the raceway, and caused the water to flow back in said raceway, and to obstruct the plaintiffs' wheel.

The jury were instructed that the deed from Barrett to Robbins passed to the grantee the right to the uninterrupted flow

of the water in said raceway through its whole extent. Verdict for the plaintiffs, and motion for a new trial, on the ground of misdirection.

Dana and Walker, for the plaintiffs.

G. F. Farley and Fletcher, for the defendants.

By Court, RICHARDSON, C. J. It is said by the defendants, that the deed of Charles Barrett passed no right in the raceway, beyond the limits of the land granted. What effect this proposition, if it could be maintained, ought to have upon the verdict, we have not stopped to inquire; because we are of opinion that the proposition itself cannot be supported. It is well known, that in the conveyance of real estate, some things have always been held to pass as incidents of other things. These incidents have been divided into several species. Thus some have been termed *regardant*, some *appendant*, and some *appurtenant*: Co. Lit. 307 a; Com. Dig., "Grant" E. 11; 5 Bos. & P. 109. The term "*regardant*" denoted the relation between a villeine and the manor, to which he belonged: Lit., sec. 184; Co. Lit. 120, a and b. An *appendant* is that which beyond memory has belonged to another thing more worthy. One thing is said to be appendant, when it has been immemorially connected with another: Com. Dig., "Appendant" A.; 7 Mass. 8; 11 Johns. 498; Co. Lit. 121 b, and 122 a; 17 Mass. 447, 448. An *appurtenant* is that which belongs to another thing, but which has not belonged to it immemorially: 1 Vent. 407; Co. Lit. 121 b, and 122 a; Moore, 682.

But it is unnecessary, in this case, to examine minutely the distinctions between the several species of incidents; because the only question is, whether a right to have the water pass uninterrupted through the whole extent of the raceway, was not granted in Barrett's deed, as an incident to the mill granted? At the time when Barrett made the grant, the raceway had been constantly used for sixteen years to conduct the water from the mill, standing where the factory of the plaintiffs now stands, and was necessary for the convenient use of the mill. Barrett, at the same time, owned all the land through which the raceway extended. And as both these parties claim under Charles Barrett, it seems to us, that as between them this raceway is to be considered as the natural channel of the river. It must be presumed to have been made lawfully by those who had a right to make it, and to have been made as an appendant to the mill, and as it had been used as such for sixteen years, it cannot

admit a question, that the right to have the water flow off in it uninterrupted passed with the mill, as an incident. In the case of *Nicholas v. Chamberlaine*, Cro. Jac. 121, Croke says: "It was held by all the court, upon demurrer, that if one erect a house, and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and the pipes pass with the house; because they are necessary and quasi appendant thereto. And he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is, if lessee for years of a house and land erect a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and pipes, and liberty to amend them."

The rule there laid down seems to us to be founded in sound reason and good sense, and to apply, in all its force, to the case now before us. A raceway may be as necessary an appurtenance to a mill to conduct the water from it, as a canal to conduct to it the water necessary to work it. In many cases, a severance of the appurtenance from the thing to which it is appurtenant, would render both useless. For aught we know, that may be the case in this instance. But, however that may be, the case finds that the raceway was necessary for the convenient working of the mills. Shepherd, in his *Touchstone*, 89, says: "By the grant of mills the waters, floodgates and the like, that are necessary use to the mills, do pass;" and we entertain no doubt that the raceway in this case passed, by Barrett's deed, as an appurtenance to the mill.

Judgment on the verdict.

APPURTENANCES.—A water-right, appurtenant to a mill, passes under the word "appurtenances" in a deed, without the addition of the word "privileges" contained in the previous contract: *Pickering v. Stapler*, 9 Am. Dec. 336, and see note to that case; see, also, *Grant v. Chase*, 9 Id. 161.

CARPENTER v. THOMPSON.

[3 NEW HAMPSHIRE, 204.]

ESTOPPEL OF LESSEE.—A lessee for years by indenture is estopped to deny his lessor's title only during the term.

ESTOPPEL AGAINST ESTOPPEL sets the matter at large.

Writ of entry, the demandant counting on his own seisin and disseisin by the tenant. Plea, the general issue. It was admitted that the tenant was once seised of the premises, and it appeared that on March 20, 1813, he conveyed the same to one Jonathan Hammond, who, by his will, which was duly proved, devised the same to the demandant. The tenant proved a reconveyance of the land to him by Jonathan Hammond, by a deed dated March 22, 1816. The demandant, however, contended that the tenant was estopped from claiming the title under said deed, by reason of a certain lease, dated March 22, 1822, which was given in evidence, and which was duly signed and sealed by the tenant and by the said Jonathan Hammond, whereby the said Hammond let to the tenant, his heirs and assigns, "all the land and buildings which the said Jonathan held from the said Moses T. Thompson, by deed bearing date the twentieth of March, 1813, and being the farm that Moses T. Thompson now improves, to have and to hold" etc., for the term of one year, the said Thompson to pay therefor, at the expiration of said year, the sum of forty-eight dollars and twenty-three cents, and all taxes assessed thereon; and it being provided by said lease that "at the expiration of said term, the premises shall revert and return into the possession of the said Jonathan," etc. The court overruled the demandant's objection to the tenant's claiming the land under the deed of March, 22, 1815, by reason of said lease, and the jury returned a verdict for the tenant. Motion for a new trial on the ground that the demandant's objection ought to have prevailed.

J. Parker, for the demandant, contended: 1. That though it was said in some of the older authorities that there is no estoppel by indenture of lease after the expiration of the term, yet this was not true in all cases: *Jackson v. McLeod*, 12 Johns. 182; *Brant v. Livermore*, 10 Id. 358; *Barwick v. Thompson*, 7 T. R. 491; *Fletcher v. McFarlane*, 12 Mass. 47; *Treviban v. Lawrence*, 1d. Raym. 1051; *Palmer v. Ekins*, Id. 1550; *Taylor v. Needham*, 2 Taun. 282; 2. That, in any event, the estoppel continued in this case, because there was in the lease an express recital and admission of the lessor's title: *Jackson v. Ayers*, 14 Johns. 224; *Steele v. Adams*, 1 Greenl. 1; *Shelley v. Wright*, Willes, 9; *Hosier v. Searle*, 2 Bos. & P. 299; *Denn v. Cornell*, 2 Johns. Ca. 174; *Jackson v. Wilson*, 9 Johns. 92; *Atkinson v. Coatsworth*, 1 Str. 512; *Doughty v. Neal*, 1 Saund. 216, n. 2; *Willoughby v. Brook*, Cro. Eliz. 756; *Stroud v. Willis*, Id. 362;

Doughty v. Fawn, Yelv. (Metc.'s ed.) 227, n. 1; Bac. Abr., Pleas and Pleadings, I, 11; *Dowman's case*, 9 Co. 10; *Cossens v. Cossens*, Willes, 26; *Lampon v. Corke*, 5 Barn. & Ald. 606; 3. That the execution and acceptance of this lease, acknowledging the title and covenanting to return the premises, was utterly inconsistent with the pretended deed of 1816, which the tenant could not, therefore, set up: *Vernon's case*, 4 Co. 5; *Springstien v. Schermerhorn*, 12 Johns. 357; *Jackson v. Hinman*, 10 Id. 292; *Jackson v. Scissam*, 3 Id. 504.

Alexander and Wilson, for the tenant.

By Court, RICHARDSON, C. J. The counsel for the demandant in this case has contended that the tenant is estopped by the lease which he took of the land on the twenty-second of March, 1822, from Hammond, to claim the land. If the term created by that lease were still subsisting, this objection might deserve consideration. But that term was only for a year, which expired on the twenty-second of March, 1823, and it seems to be well settled that in these cases the estoppel, so far as relates to the reversion, expires with the term.

Lord Coke says: "If a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended. For by the making of the lease the estoppel doth grow, and consequently, by the end of the lease the estoppel determines:" Co. Lit. 47 b.

In *James's case*, Moor, 181, James, seised of land in fee, took a lease for years from a stranger, by deed indented, of his own land. The term expired, and the stranger entered, and James brought an action of trespass; and the issue was, whether James had a freehold in the land or not; and the jury having returned a special verdict, the question was, whether the lease was an estoppel after the term ended; and it was agreed by the judges that it should be an estoppel only during the term. The same case is reported in Cro. Eliz. 36, and is mentioned in the end of *Rawlyn's case*, 4 Croke, 54.

In the case of *Brudnell v. Roberts*, 2 Wils. 143, the action was covenant brought by the plaintiff upon a lease for years, as heir in reversion in fee to his father, and the breach assigned was want of repairs; the defendant pleaded that the father, when he made the lease to him, was only tenant for life, and that the father being dead, the lease was determined and traversed, and after the making of the indenture of lease the re-

version belonged to the father and his heirs. To this plea the plaintiff demurred. It was said by the defendant's counsel that during the continuance of the lease the defendant would have been estopped to say that the lessor had not the reversion in him, but the lease being at an end, the lessee was, as it were, unmuzzled, and not estopped to plead the truth. And the reporter says, of that opinion was the whole court.

There was a similar decision in the case of *Blake v. Foster*, 8 T. R. 487. Indeed the principle seems never to have been disputed: 7 T. R. 537; Com. Dig. "Estoppel," F; Cro. Eliz. 700. The question is not whether the tenant in this case is estopped to say that the lessor had nothing in the land during the year, which the lease continued: *Kemp v. Goodall*, 1 Salk. 277; *Heath v. Vermeden*, 3 Lev. 146; *Wilkins v. Wingate*, 6 T. R. 62. But the question is whether the tenant, as the term created by the lease has now expired, is estopped to say that the lessor had nothing in the reversion. The question is too well settled by the authorities to which we have referred to admit a doubt. It is, however, urged that although the tenant may not be estopped by the mere demise after the expiration of the term, yet he is estopped by the description of the land in the lease: "All the land which the said Jonathan holds from the said Moses T. Thompson, by deed bearing date the twentieth of March, 1813."

It is a general rule well settled that when a deed refers to a generality, the party may aver that the matter to which the reference is made does not exist. But where it refers to a precise thing as existing at the time it is an estoppel. This is well illustrated by the case of *Paramoure v. Dunning*, Moor, 420. "The condition of an obligation was to pay all legacies which J. S. had devised by his will; the defendant would have said that J. S. made no will; but by the court he shall be estopped; but he may say that J. S. gave no legacy by his will." Here the will was referred to as in existence. But an agreement to pay all legacies given by a particular will is not an admission that there are any to pay: Willes, 9; 2 Bos. & P. 299; Com. Dig. "Estoppel," A, 2.

But whether this case falls within this general rule need not now be settled, because there is another answer to this objection which is decisive. For if this tenant might be estopped by the lease of 1822, to say that Hammond did not hold the land at that time under the deed of 1813; still this demandant, who claims under Hammond, would be estopped by the deed of 1816, to say that Hammond did, in 1822, hold the land

under the deed of 1813, and there would be an estoppel against an estoppel, which sets the matter at large.

ESTOPPEL BY ACCEPTANCE OF LEASE.—The law relating to the estoppel growing out of the acceptance of a lease, and to the duration of such estoppel, is discussed in the note to *Camp v. Camp*, 13 Am. Dec. 68.

BARRETT v. WHITE.

[3 NEW HAMPSHIRE, 210.]

HAY IN A BARN MAY BE ATTACHED, and may also be removed, if necessary for its security.

A SHERIFF UNNECESSARILY REMOVING HAY thus attached, or wantonly removing it at an improper time, is liable as a trespasser *ab initio*, if the property is injured by such removal.

TRESPASS for taking and carrying away certain hay, rye and oats. Plea in bar, by White, defendant, that, being a deputy sheriff, he took said articles by virtue of a writ of attachment against the plaintiff. Reply, that after attaching the goods, the said White abused and wasted them, and issue joined thereon. Joseph Haskell, defendant, pleaded in bar that he purchased a writ against the plaintiff, and delivered the same to White, who, by virtue thereof, took the articles. Reply, that after the goods were attached, A. and J. Haskell, by command of the said Joseph, abused and wasted said goods, and issue joined thereon. The other defendants justified as servants of White. Reply, that they severally abused and wasted the goods attached, and issue joined thereon.

It appeared that the plaintiff, an inhabitant of Concord, Massachusetts, owned a farm in Troy, New Hampshire, fifty miles from Concord; that White having two writs of attachment against the plaintiff, went to his barn in Troy, on the morning of December 2, 1822, shortly after midnight, and attached a large quantity of hay, rye and oats, and without attempting to secure the same there, or giving the plaintiff an opportunity to procure a person to be responsible for the property, immediately removed the same in very unfavorable weather, whereby the hay and grain were much injured, the other defendants being present, and assisting him.

The jury were instructed that it was the duty of an officer, after attaching goods, to endeavor to secure them in the place where found, or if this be impracticable, to give the debtor the notice, so as to enable him to prevent the removal by paying

the debt, or furnishing some person to become responsible for the goods; that the officer might put the property into the custody of some person at the debtor's expense until he could be notified; and that if the jury were satisfied that White immediately proceeded to remove the property, without attempting to secure it where found, or giving the debtor an opportunity to prevent its removal, he and those who assisted him were liable as trespassers for the resulting damages. Verdict for the plaintiff, with sixty dollars damages, and motion for a new trial on the ground of misdirection.

Chapman and L. Chamberlain, for the defendants.

J. Parker, for the plaintiff.

RICHARDSON, C. J. The first question to be settled in this case is, whether the articles mentioned in the declaration were, under the circumstances, liable to be attached upon mesne process; because, if they were not, it is very clear, these defendants are all trespassers. This question is to be settled by a recurrence to the rules of the common law, in analogous cases, and to our own practice. There is a close analogy between our attachments upon mesne process and a distress at common law, to compel an appearance or the performance of a duty; and the decisions, which have settled what may be distrained, have been supposed to have a direct bearing upon the question, which we are now to consider. Those decisions will therefore be in the first place examined. And the result of such an examination cannot be expressed with more precision and perspicuity than in the language of Parsons, C. J., in the case of *Bond v. Ward*, 7 Mass. 129 [5 Am. Dec. 28]. "At common law, all distresses, as well those to compel an appearance, as to perform any other duty, must, when the duty is performed, be restored in the same plight in which they were taken. For this reason, goods could not be distrained, which in consequence of the distress could not be returned in the same plight, in which they were taken, as sheaves of corn, or hay in a barn, because they would be injured; as the grain of the sheaves would be shattered. But the sheaves or hay in a cart might be distrained in the cart, because, by removing them with the cart no damage might happen to them."

This account of the ancient law, on this point is, in truth, the fair sum of all the authorities relating to the subject: Co. Lit. 47 a: and b.; Com. Dig. "Distress," B. and C.; 1 Rolle's Ab. 666; *Wilson v. Duckett*, 2 Mod. 61. But in England, the com-

mon law was altered on this subject by the statute of 2 W. & M., cap. 5, which enacted, that any person having rent arrear on a demise, might seize sheaves or shocks of corn, or corn in the straw or loose, or hay in a barn, granary, or upon a hovel, stack, or rick, or otherwise, upon any part of the land charged with such rent, and lock up and detain the same in the place where found, so as such corn be not removed to the prejudice of the owner: Bacon's Ab. "Distress," D. And what was done in England by statute in this respect, in relation to distresses, has been done here by immemorial usage, in relation to attachments upon mesne process. For it is believed, that no man now living can recollect the time, when it was not the practice to attach upon mesne process hay in a barn: *Campbell v. Johnson*, 11 Mass. 184. Nor is it known that any general inconvenience has arisen from this practice. It being the interest of both the debtor and the creditor, that property attached should be preserved safely and not be wasted, some arrangement has in general been made to prevent the damage, which hay, and grain in the straw, must sustain by a removal. Either some person has been found, in whose custody it could be left, or who was willing to become responsible for the delivery of it when demanded; or it has been in some other way secured in the place where attached. It is believed to have been very rare, that hay or grain in the sheaf have been removed from a barn. And when it has been, it was only when small quantities were attached. In this way creditors have been enabled to seize this sort of property to secure their debts, without any material injury to the debtor; and on the whole, no doubt is entertained, that articles of this kind are subject to attachment on mesne process.

It may be useful to inquire in the next place, whether these defendants so conducted with the property attached as to render themselves liable in any form of action for the damage it sustained. Because, if this question is to be answered in the negative, all further inquiry is unnecessary. When an officer seizes goods upon mesne process, it is his duty to see them safely kept, in order that they may be had to satisfy the claims of the attaching creditor, if wanted; and if not needed for that purpose, that they may be duly restored to the debtor. He ought, in the first place, to take care that they are not left in such a situation as to mislead other creditors, and to be thus exposed to be lawfully seized on other process. His duty to the creditor binds him to do this. But this should be done

with as little expense, and with as little injury to the property attached as may be. He is not to destroy the goods, in order to prevent a seizure by other officers; nor is he to cause any unnecessary waste or expense for that purpose. He is bound by his duty both to the debtor and creditor to be cautious and prudent in this respect. In the discharge of his duties on occasions of this kind, he must be allowed the exercise of some discretion, and is not to be made liable for every trivial mistake in judgment he may make in doubtful cases. But the discretion allowed him must be a sound discretion, exercised with perfect good faith, and with an intent to subserve the interests of both the debtor and the creditor. There are cases, without doubt, in which hay attached in a barn may, and ought to, be removed. But as it is well known that this cannot be done without considerable waste, and some damage to the article, reasonable diligence should be used by the officer to prevent it, if practicable. There are many ways in which the waste incident to a removal in these cases may be avoided. It may sometimes be done by the debtors paying the claim of the creditor, or by procuring some person to become surety for the payment. With the assent of the debtor, the hay may be locked up in the barn, or may be left in the care and custody of some person in the neighborhood. In many cases, individuals may be found willing to become responsible for the delivery of the goods attached upon demand. It is believed that in practice it has rarely been found necessary to remove hay when attached. Some arrangement has in general been readily made to prevent a removal. Most assuredly there are ways and methods enough in which a removal may be avoided to render it fit and proper that the officer should give the debtor an opportunity to avail himself of them, if he see fit. In cases where very great waste must be made by a removal, it can hardly admit a doubt that it is the duty of the officer to give the debtor notice of the attachment before he proceeds to make the removal. Indeed, the officer should demean himself as every prudent man would under like circumstances. If the waste and injury of a removal can be avoided by ordinary diligence, it is to be avoided. When no way of securing the property in the place where attached is found practicable, then, and not till then, it is to be removed.

Now let the conduct of the officer, in the case under consideration, be tested by these rules and principles. A very large quantity of hay and of grain in the straw was attached. The

seizure was made a little after midnight, when the weather was such as to render it a very unfavorable time to remove the property. The debtor resided about fifty miles from the place where the attachment was made. What ought, under these circumstances, to have been done? The first thing, which one would suppose must have struck the mind of a man of common prudence in such a case, would have been the propriety of waiting for the return of favorable weather, or at least, for the return of open daylight, before any attempt was made to remove the property. But in this case, these circumstances were wholly disregarded, and the removal commenced in the night, in defiance of the wind and weather.

As the quantity of hay and grain was very considerable, it must have been very obvious to every mind, that much expense and trouble, as well as waste of the property, might be saved by securing the property in the barn, where it was seized. And it is not a little surprising, that it should not have occurred to the officer on that occasion, that it was proper to consult the debtor, or his tenant, as to the practicability of thus securing the property. But the operations of these defendants seem not to have been delayed a moment by a thought of this kind.

There is another view of this subject, which must not be disregarded. The debtor in this instance, seems to have had in his possession, a considerable amount of property, while the claims of the attaching creditors did not amount to a very large sum. In such a case, the propriety of delaying the removal of a large quantity of goods extremely liable to be injured by removal, until the debtor could have notice, and thus have an opportunity to prevent the waste and loss, which a removal must occasion, by adjusting the claims of the attaching creditors in some way, must have been very obvious. This could not have caused a delay of more than two or three days, during which the property might have been kept with perfect safety, for a very trivial expense. Yet, this view of the subject, obvious as it seems to be, had no influence upon the course of these defendants.

The goods attached were removed without any delay. The consequence was just what was to have been expected. There was a great waste of the property. The jury have assessed the actual damage at sixty dollars, when, if we rightly recollect, the whole amount of the debts, to secure which the attachment was made, was under two hundred dollars. For myself, I must confess, that when I consider the time and the weather, when

the removal of the property took place, and the very great haste with which it was done, I am wholly at a loss to conjecture any fair motive, which could have impelled the defendants to pursue the course they adopted. Their motives are, however, immaterial in this case. But whatever may have been their views, their conduct was, in my judgment, extremely improper, and was such an abuse of the process of the law, as must render them liable for the damages which the plaintiff has sustained.

In the case of *Rice v. Proctor*, to which Parsons, C. J. alludes in his opinion in the case of *Bond v. Ward*, 7 Mass. 430 [5 Am. Dec. 28], the facts were as follows: Proctor had given to Rice a lease of a farm for a year, at a certain rent; and apprehending that Rice was in failing circumstances, brought his action for the rent before the expiration of the year, and attached a quantity of hay, which Rice had put into the barn upon the farm. The action thus commenced was tried in the court of common pleas in Middlesex, December term, 1807, and Proctor failed in his suit, having, in the opinion of the court, commenced it prematurely, and before the rent was due. The attachment being thus dissolved, Rice had his hay again. But being an innkeeper, and having sustained damage by the temporary loss of his hay, he brought an action of trover against Proctor, to recover the damage he had sustained. This cause was tried in Middlesex, at April term, 1809, and a verdict returned for the plaintiff; upon which the court, after having the case for some time under consideration, afterwards rendered judgment. If, upon the facts of the case, Rice was legally entitled to maintain an action, it would have been matter of no little surprise, had it been found that this plaintiff, upon the facts here stated, was entitled to no redress.

But one further question remains to be examined. Have these defendants so conducted as to render themselves trespassers *ab initio*? For as the seizure of the goods was lawful, if they have not so conducted, this action cannot be maintained. The general rule is, that he who at first acts with propriety under an authority or license given by law, and afterwards abuses it, shall be considered a trespasser from the beginning: *The Six Carpenters' case*, 8 Coke, 290; 1 Chit. Pl. 172; Perkins, sec. 190; Com. Dig., "Trespass," C, and "Distress," D, 6.

The reason of this rule seems to be, that it would be contrary to sound public policy to permit a man to justify himself at all

under a license or authority allowed him by law, after he had abused the license or authority thus allowed him, and used it for improper purposes. The presumption of law is, that he who thus abuses such an authority, assumed the exercise of it in the first place, for the purpose of abusing it. The abuse is, therefore, very justly held to be a forfeiture of all the protection which the law would otherwise give. The nature and extent of the rule will be best understood by an examination of the particular cases in which it has been applied. If a man enter into a tavern to drink, and after drinking carry away the cup against the will of the taverner, he shall be punished for his first entry; for it cannot be intended that his entry was with any other intent than to take the cup, for the law cannot judge his intent against his act: Perkins, sec. 191. In trespass for taking and cutting the plaintiff's nets and oars, the defendant pleaded in bar, that he had a several fishery, and that the plaintiff endeavored with the oars to row upon the water, and with the nets to take his fish, and that, for the safeguard of his fishing he took and cut the nets and oars. To this plea the plaintiff demurred; and the plea was held to be bad; because, although the defendant might have seized and detained the nets and oars, as damage *feasant*, yet the cutting was unlawful and made him a trespasser: *Reynell v. Champernoon*, Cro. Car. 228. In trespass for taking and carrying away a horse, the defendant pleaded that he took and detained the horse as an estray. The plaintiff replied, that the defendant labored the horse, riding upon him and drawing with him. To which replication the defendant demurred. The court held that the defendant was punishable for the abuse as a trespasser *ab initio*: *Bagshawe v. Goward*, Cro. Jac. 147; S. C., Yelv. 96, S. P.; *Oxley v. Watts*, 1 T. R. 12; 3 Wils. 20. So it has been held, that if a lessor enter to see if waste has been done upon the land leased, and remain all night upon the land without the assent of the lessee, he becomes a trespasser *ab initio*: 2 Rolle's Ab. 561. And the tanning of raw hides, seized as a distress, has been held to make him who seized them a trespasser; because they are so changed by the operation as not to be known by the owner: *Durcomb v. Reeve*, Cro. Eliz. 783; 2 Rolle's Ab. 561.

If an officer, who has entered a house and there attached goods, keep the goods in the house for a long and unreasonable time, without removing them to a place for safe custody, he becomes a trespasser *ab initio*: *Read v. Harrison*, 2 W. Bl. 1218; *Griffith v. Scott*, 2 Str. 716; 11 East, 394 and Id. 404, note.

In *Gibson's case*, 2 Rolle's Ab. 561, it was decided, that if a searcher seize certain stuffs and unpack them, and place them in the dirt by which they are injured, although the search was lawful, yet the placing the goods in the dirt was such an abuse of his authority as to render him a trespasser *ab initio*. Where an officer, who was authorized by a statute of the United States, to seize and sell goods as a distress for taxes, seized goods and sold them immediately at auction, without giving any notice of the time and place of sale, he was held to be a trespasser *ab initio*: *Blake v. Johnson*, 1 N. H. 41. So in *Sackrider v. McDonald*, 10 Johns. 253, it was decided, that if a distrainer of cattle, *damage feasant*, impound them without having the damage ascertained, as required by the law of the place, it was unlawful, and made the party impounding the cattle a trespasser *ab initio*: *Pratt v. Petrie*, 2 Johns. 191.

In some cases, a public officer may forfeit the protection of the authority under which he acts, by an abuse, which consists in mere *non-feasance*, as in the case when a sheriff, who has made an arrest or a seizure of goods by virtue of mesne process, neglects to return the process. In such a case he will not be permitted to justify the arrest or seizure under it: 1 Chit. Pl. 186; Com. Dig. "Return" F, 1; *Hoe's case*, 5 Coke, 99; 2 Rolle's Ab. 563.

In the case of *Purrrington v. Loring*, 7 Mass. 388, Parsons, C. J. seems to intimate an opinion that if the act of a public officer be in itself lawful, he cannot be made a trespasser *ab initio*, by showing that the act was done in an improper manner; but that opinion was altogether extrajudicial. The point did not arise in the case, and the decision was placed upon other grounds. And in the case of *Phillips v. Bacon*, 9 East, 303, Lord Ellenborough, after hearing an argument upon the point, declared that he was strongly inclined to a contrary opinion.

On the whole, it is believed, that an attentive examination of all the authorities will clearly show that a man may become a trespasser *ab initio* not only by using an authority, which the law gives him, for improper purposes, or by pushing the exercise of it beyond its due limits, but by exercising it in an improper and illegal manner to the prejudice of another. There are, therefore, two grounds in this case, on either of which, in my judgment, these defendants may be considered as trespassers.

In the first place, the hay and grain were moved without any necessity which can justify the removal. The damage and waste incident to such removal must therefore be considered as

wantonly caused by the defendants. And this wanton and illegal use of process is a forfeiture of the protection which it would otherwise afford. And in the next place, had there been a necessity to remove the goods attached, the doing of it at an unfit and unreasonable time, when it must inevitably be exposed to great and unnecessary waste and destruction, would have been such an abuse as to render all concerned in it trespassers.

GREEN, J. The question in this case is not whether any action upon the facts disclosed can be sustained against the defendants, but whether those facts are, in law, sufficient to enable the plaintiff to maintain an action of trespass. That the hay, etc., was attachable property is beyond doubt the uniform practice, ever since our existence as a state, is alone sufficient to put at rest any doubts as to this right. In Massachusetts the question has been agitated and solemnly settled in conformity to our practice: *Campbell v. Johnson*, 11 Mass. 184.

Therefore, in taking the property mentioned in the plaintiff's declaration, the defendants did no more than their duty—one of them, the officer, acted in obedience to a precept in his hands from lawful authority, and the others acted at his request and as his assistants; if, therefore, they are liable in this action, it is not for any wrong done in taking the plaintiff's property, but because their subsequent conduct made them trespassers *ab initio*.

It is immaterial then to ascertain what departure from duty makes an officer, having process, a trespasser from the beginning, because the rule for assessing damages depends upon it; if the defendants are trespassers *ab initio*, their defense wholly fails, and they are liable to pay the same sum in damages which they would have been compelled to pay if they had gone on without any precept or pretense of authority, and done all the acts proved upon them; but if they are liable only in case, and not in trespass, then they are answerable only for such sum in damages as will compensate the plaintiff for the injury he sustained by that part of their doings which was illegal, irregular and wrong; and they were protected by the writ for that part which was legal and proper.

There is no question but an officer who, by virtue of a writ, lawfully takes property, may, by his subsequent abuse, become liable as a trespasser from the beginning; and it is equally clear that every irregularity and error committed by such officer will not make him a trespasser from the beginning. The rule

seems to be that when the officer wholly departs from the course pointed out for him by the law, he may be considered as intending to do so from the beginning, and as making use of the process of law for a mere pretense and cover; and that, therefore, he is liable in the same manner, and for the same damages, as he would have been if he had done the same acts without the legal warrant he abused.

Where, however, the officer evidently means to do his duty faithfully and properly in pursuance of the authority given him by law, but commits some errors and mistake, by which a debtor may sustain damage, the officer is not liable as a trespasser, though he may be liable in case for the damage done by his errors and mistakes to the person who sustains it. Thus where the defendants took a hog *damage feasant*, and afterwards converted the same to their own use, they were considered liable as trespassers *ab initio*: *Dye v. Leatherdale*, 3 Wils. 20. So trespass was adjudged to lie against a landlord, who, on making a distress for rent, turned the family out of doors, and kept possession of the premises on which he had impounded the distress: *Etherton v. Popplewell*, 1 East, 138. So, where the defendant took a horse as an estray, and afterwards worked him, he was considered as a trespasser *ab initio*: *Oxley v. Watts*, 1 T. R. 12.

In these cases, the persons who were adjudged trespassers, were not so adjudged for any errors or mistakes which persons of common intelligence and care might commit, but for such a complete departure from the line of duty as to warrant the conclusion that they intended, from the first, to commit wrong, and use their legal authority as a cover to their illegal conduct; but where the facts proved warrant no such conclusion, the persons charged with them are not trespassers.

It has been settled that an action of trespass cannot be maintained for taking an excessive distress: *Hutchins v. Chambers*, 1 Burr. 590. It was also said by Chief Justice Parsons, in the case of *Purrington v. Loring*, 7 Mass. 338, that if an officer having seized goods by virtue of a warrant of distress, wantonly removes them to a great distance before the sale, whereby the owner is injured, an action of the case may be maintained against him, but he is not for this a trespasser *ab initio*.

The taking an excessive distress, and the removal of goods taken by warrant of distress, to a great distance, though wrongs, are not such acts as will warrant the conclusion that the persons committing them intended from the beginning to abuse their au-

thority, and, therefore, do not make the persons committing them trespassers *ab initio*; but it is said, that, when six ounces of gold and one hundred ounces of silver were taken for six shillings and eight pence, it was holden to be an excessive distress for which the party was liable in trespass, because that appeared upon the face of it, and upon pleadings, to be excessive, and because it was a distress of gold and silver, which are of certain known value, and even the measure of the value of other things: 1 Burr. 590. Here could be no mistake, it must have been a willful abuse of authority, and, therefore, the law supposes the party committing it intended it from the beginning.

The question for decision then is, whether the facts in this case show the conduct of the defendants to be so outrageous as to raise a presumption that they intended from the beginning to use the authority of law as a mere pretense for destroying the plaintiff's property; or, whether these facts discover such errors and mistakes only, as the law will presume men clothed with authority may commit, intending all the time to act in pursuance of such authority. The facts, as reported by the judge who tried the cause, are:

1. "The officer went to the plaintiff's barn soon after midnight and made the attachment." It might be necessary to make the attachment in the night to secure the plaintiff's demand. If, therefore, the present plaintiff suffered damages by reason of the attachment being made in the night, it was his own misfortune, and not the fault of the officer.

2. "The officer did not make any attempt to secure the hay, etc., where found." But it does not appear that such attempts, if they had been made, would have been successful; probably the reason why they did not make the attempt was, because they knew, if made, it would prove fruitless; at any rate it was the right of the officer, who was answerable for the property, to judge whether the hay would be secure in the plaintiff's barn or those of the neighbors; and if he judged wrong, he is not, on that account a trespasser. If the plaintiff has suffered by such errors of judgment, he can, at most, recover such damages as he has sustained in consequence of it in an action on the case.

3. "The officer did not give the plaintiff notice (at the distance of fifty miles) that his property was attached before removal." It is the duty of an officer having a writ of attachment, and to whom goods of the debtor are shown, to seize them, take them into his custody, and keep them under his control, so that he may have them to answer any judgment which the plaintiff in

the suit may recover. If the officer chooses to deliver them into the hands of a third person, on his receipt and promise to have them forthcoming, still the law considers the goods in the hands of the officer, and such third person is but his servant. Unquestionably the officer ought to perform this duty openly and fairly, that a debtor, attentive to his affairs, may not be deprived by him of any opportunity which his situation affords him to prevent expense, and the waste and destruction of his property. The law requires, in all cases, that its officers should conduct themselves with fairness and moderation. Notice to a debtor in cases of attachment, before removing the property, seems not necessarily connected with any of these acts, which the law requires of an officer when he attaches goods on mesne process. He may obey the precept of his writ, take the goods of the debtor into his custody and keep them under his control, without going out of his way, or incurring any expense, by giving the debtor notice of what he has done. There is certainly no statute making it the duty of the officer to give such notice to the debtor; and if there has been any decision of this court to that effect, it is entirely unknown to me. Indeed, I am not aware that the doctrine has the sanction of any decided case, or the dictum of any judge, for its support. It cannot be pretended that an officer is bound to give notice to the debtor in all cases, let the distance and circumstances be what they may. In what cases, then, is the officer bound to give this notice? Within what distance must the defendant live to be entitled to it, and what must be the degree of injury the property may sustain by removal? If such notice is required of the officer, he must judge of these things; and if he happens to err in opinion, is he to be subjected to an action of trespass, and placed in no better situation than if he had proceeded without process? If the law makes this a part of the duty of the officers, the practice hitherto has been altogether erroneous; I may also venture to add, with much assurance, that no such opinion has ever been entertained by any member of the bar. From these considerations, I am unable to bring myself to the belief that any such duty is, by law, required of officers. There is no question that the law of this state, which authorizes creditors (or those who pretend to be such) to attach the property of their supposed debtors, on mesne process, is exceedingly liable to abuse. No doubt, debtors have suffered inconvenience from this law. Perhaps it may be further admitted that some limitation and restriction on the power of creditors, attaching

on mesne process, would be an improvement of the law in this respect; but whether debtors would, in common cases, derive as much advantage from notice of the attachment to be given by the officer at their expense, while the goods are still kept under the care of watchmen, also at their expense, as would compensate for all such expense, is very questionable. The question, however, before the court is, not what the law ought to be, but what it is. It is the province of judicial courts *jus dicere, non jus dare*.

4. "The hay, etc., was removed in very unfavorable weather." It has before been attempted to be shown that an officer has a right to remove for safe keeping such property when attached; and having this general right, any injudicious conduct, as to the manner and time of removal, cannot be considered such a total departure from the line of duty as to justify the imputation that he seized the property originally with that view, and subject him to the same damages, as if he had done the act without any color or pretense of authority.

Suppose the law authorized a person taking a distress to use it moderately, and it should be used immoderately; is it possible that the persons thus using the distress should be answerable for any further damages than were occasioned by the excess? He was doing a lawful act, but he did it wantonly and carelessly; in such case there would evidently be wanting that entire departure from duty which seems to attend all the cases where persons, by their subsequent unlawful acts, have been adjudged trespassers *ab initio*. The law arising on the foregoing facts does not, in my view, entitle the plaintiff to the present action. If the plaintiff has suffered injury from the irregularities and mistakes of the defendants in serving a lawful precept, he has his remedy by an action on the case; but it would in my opinion be monstrous to say that they are liable to the same extent, and for the same sum in damages, as they would have been if they had done what is here charged without any authority whatever; and inasmuch as this consequence must follow from a decision that they are liable as trespassers, I am of opinion that the defendant's motion ought to prevail: *Winterbourne v. Morgan*, 2 Wils. 313; 11 East, 394; *Van Brent v. Schenck*, 11 Johns. 377; 1 Chit. Plead. 172-3; Bull. N. P. 81; *Six Carpenters' case*, 8 Coke, 146.

HARRIS, J., concurred with the chief justice.

Judgment for the plaintiff on the verdict.

ABUSE OF PROCESS, TRESPASS AB INITIO.—The distinction drawn in the *Six Carpenters' case*, 8 Co. 146; 1 Sm. Lead. Cas. 216, between an authority in law and an authority in fact, with reference to the effect of an abuse of such authority, is one which has been observed in all the decisions upon the subject, although the authorities differ somewhat as to the real foundation of the distinction. It is well settled that where an authority is given to one by law, and he wantonly abuses it, he will become a trespasser *ab initio*, while it is equally well settled that an authority or license conferred in fact cannot be annulled by any subsequent act of the licensee, so as to deprive him of its protection as to what has been previously rightly done under it: *Allen v. Crofoot*, 5 Wend. 506; *Ballard v. Noaks*, 2 Ark. 45; *Wendell v. Johnson*, 8 N. H. 220; *Jewell v. Mahood*, 44 Id. 474; *Hunnewell v. Hobart*, 42 Me. 565; *Cushing v. Adams*, 18 Pick. 110; *Smith v. Pierce*, 110 Mass. 35; *Edelman v. Yeakel*, 27 Pa. St. 26. The reason given for this distinction in the *Six Carpenters' case*, is "that in a case of general authority or license of law, the law adjudges by the subsequent act *quo animo*, or to what intent he entered, for *acta exteriora indicant interiora secreta*: Vide 11 H. IV. 75 b. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license." It is not easy to see, however, why we may not infer as readily in the one case as in the other, that where an abuse of authority occurs the wrong-doer intended from the beginning to misuse it, and to make it the cover for his wrongful act. A more satisfactory reason for the distinction is the necessity of requiring one acting under an authority in law, to pursue it strictly on grounds of public policy, to prevent such an authority from being turned into "an instrument of injustice and oppression," while no such necessity exists in the case of a mere personal license: *Hammond's Nisi Prius*, 59; *State v. Moore*, 12 N. H. 42; *Allen v. Crofoot*, 5 Wend. 506. When the law gives one man an authority to enter upon or take possession of another's property against the owner's will, it must provide ample safeguards against the abuse of the authority, since it disarms the owner of the power of protecting himself. But where the owner himself gives the authority, the means of protection are in his own hands.

WHAT ABUSE OF PROCESS CONSTITUTES OFFICER TRESPASSER.—It is not every trifling irregularity in the execution of process which will render an officer a trespasser *ab initio*. There must, it would seem, be such gross misconduct as to furnish an indication that he intended at the outset to use his process as a cover for wrong-doing. It would not be just, for any slighter cause, to deprive him of the protection of the process as to what has been rightly performed. *Fowler, J.*, in *Taylor v. Jones*, 42 N. H. 25, says on this point: "In order to make one who has acted with propriety under legal process liable, *ab initio*, for subsequent illegal acts, it must be shown that he abused the authority under which he acted: *Gordon v. Clifford*, 28 N. H. 412. An intention afterwards to abuse the authority will not do it: *French v. Marston*, 24 N. H. 450. What constitutes an abuse of authority is well settled. Mere *non-feasance* does not amount to it: *The Six Carpenters' case*, 8 Co. 290; *Gardner v. Campbell*, 15 Johna. 402, where it was held that a person taking the goods of another under lawful authority, does not become a trespasser *ab initio*, by refusing to restore them after his authority is determined. To the same point are *Dunham v. Wyckoff*, 3 Wend. 280; *Hall v. Tuttle*, 2 Id. 475; *Marshall v. Davis*, 1 Id. 109; *Judd v. Fox*, 9 Cow. 259; *Clark v. Skinner*, 20 Johna. 165 [11 Am. Dec. 302]; *Mills v. Martin*, 19 Id. 32; *Morris v. Dewit*, 5 Wend. 71; *Gates v. Lounsbury*, 20 Johna. 427. Such

an error or mistake as a person of ordinary care or common intelligence might commit, will not amount to an abuse; but there must be such a complete departure from the line of duty, or such an improper and illegal exercise of the authority to the prejudice of another, such an active and willful wrong perpetrated, as will warrant the conclusion that its perpetrator intended from the first to do wrong, and to use his legal authority as a cover for his illegal conduct. Where the acts proved warrant no such conclusion, the person charged with them is not a trespasser: *Barrett v. White*, 3 N. H. 210, and authorities cited by Chamberlain *arguendo*, and in the dissenting opinion of Green, J.: *State v. Moore*, 12 N. H. 42; *Ferrin v. Symonds*, 11 Id. 363."

On the ground that, in order to deprive the officer of the protection of his process, his abuse of it must be such as to afford a presumption that he intended it beforehand, it was held by Litledale, J., in *Smith v. Egginton*, 7 Ad. & El. 161, that an officer who detained a prisoner lawfully committed to his custody for a contempt, beyond the time when he should have discharged him under a particular statute, of the applicability of which to the case it was claimed he had no notice, he did not thereby become a trespasser *ab initio*, for the reason that the unlawful detention under the circumstances could not have been intended when he received him. The same rule was laid down and applied in *Page v. De Puy*, 40 Ill. 406.

MUST BE POSITIVE ACT, NON-FEASANCE INSUFFICIENT.—It was resolved in the *Six Carpenters' case*, "that not doing cannot make the party who has authority or license by the law a trespasser *ab initio*, because, not doing is no trespass." In accordance with this principle it has been held in many subsequent cases that mere *non-feasance* will not render an officer, acting under process, a trespasser *ab initio*. Thus, it was decided in *Churchill v. Churchill*, 12 Vt. 661, that refusal to take bail when offered by a prisoner was simply *non-feasance*, and did not make the officer a trespasser from the beginning. So, where a partition was necessarily taken down to enable an officer to remove attached property, it was held that his not replacing it was mere *non-feasance*, and did not render him liable as a trespasser *ab initio*: *Pullman v. Stearns*, 30 Vt. 443. So, negligence in keeping property levied on has been held *non-feasance*: *Waterbury v. Lockwood*, 4 Day, 257. So, where an officer refused to restore goods taken in execution after the debt had been paid: *Gardner v. Campbell*, 15 John. 401. So, where a collector of taxes, having arrested a delinquent tax payer, under a lawful warrant, omitted to make a certain indorsement on the warrant lodged with the jailor: *Gordon v. Clifford*, 28 N. H. 402. And in *Parker v. Pattee*, 4 N. H. 53, it was held that a mistake or omission in return of process would not render the officer a trespasser *ab initio*, being mere *non-feasance*. So, it was held in *Ordway v. Ferrin*, 3 N. H. 69, that a collector of taxes, having seized property as a distress, did not become a trespasser *ab initio*, by merely keeping the property beyond the time prescribed by statute for its sale. But precisely the contrary was held in *Brackett v. Vining*, 49 Me. 356. And in *Bond v. Wilder*, 16 Vt. 393, also, it was held that neglect to sell property taken under process at the time authorized by law, would render the officer a trespasser *ab initio*. For another illustration of the rule as to *non-feasance*, see *Walker v. Lovell*, 28 N. H. 138.

And, in further accord with the doctrine of the *Six Carpenters' case*, it has been held that no abuse of process will render an officer a trespasser *ab initio*, unless the act constituting such abuse is forcible and of such a nature as to be a trespass but for the protection of the process: *Ferrin v. Symonds*, 11 N. H. 363. Mere intention to do the act will not suffice: *Gates v. Lounsbury*, 20

Johns. 427. Nor will the use of abusive or vituperative language, in the execution of process, make the officer a trespasser *ab initio*: *Adams v. Rivers*, 11 Barb. 390. And it has been held that extorting more money than is due on a writ will not have that effect, for extortion is not trespass: *Shorland v. Govett*, 5 Barn. & C. 485. But see cases hereafter cited holding an apparently contrary doctrine. So it is held that the act constituting the abuse of process, in order to deprive the officer of its protection, must be a trespass in its nature, in *Jewell v. Mahood*, 44 N. H. 474.

It must be confessed that the soundness of the reasoning upon which the rule as to *non-feasance* in the *Six Carpenters' case* is based, is not very obvious, although the rule is so amply supported by authority. Why is it necessary that the abuse of the process should in itself be an act constituting a trespass? When the protection of the process is removed, all the officer's proceedings relate back to the original entry or taking, and his whole conduct in the premises is the trespass complained of. The element of force required to constitute the trespass is found in the original entry or seizure, which becomes unlawful by the subsequent abuse of the process. While it is true that "not doing is no trespass," may it not be so wanton and wrongful as to render the previous "doing" a trespass? This would appear to be the proper inquiry in such cases. Upon principle, therefore, it would seem to be wholly unnecessary that the act constituting the abuse of the process should itself be a distinct trespass. It may well happen that an officer, proceeding under a writ, may, by willful inaction when the law requires him to act, be guilty of as gross and wanton a breach of duty as if he had done a positive wrongful act; and it would seem that he ought not to be protected by a mere artificial distinction. And, as will be seen from an examination of the cases hereafter cited, in which officers have been held trespassers *ab initio*, for abuse of process, the courts have, in many instances, practically disregarded the distinction between *non-feasance* and *misfeasance*.

ACTS RENDERING OFFICER TRESPASSER.—Among acts which have been held to be such abuse of legal authority as to render one acting under such authority a trespasser *ab initio* are the following: Levying on the personal effects of an administrator after entering under process against the goods of the intestate: *Hazard v. Israel*, 2 Am. Dec. 438. Putting intoxicated person in charge of attached property: *Malcolm v. Spoor*, 12 Met. 279. Permitting bailees of property taken on process to make use of the same for his own benefit: *Briggs v. Gleason*, 29 Vt. 78. So making any improper disposition of property so taken: *Eaton v. Cooper*, 29 Vt. 444. So any misuser of property distrained: *Nash v. Mosher*, 19 Wend. 431, per Cowen, J. But using articles which have been seized under an attachment in the necessary removal of other goods taken under the same writ is not such abuse of the process as to render the officer a trespasser *ab initio*: *Paul v. Slason*, 22 Vt. 231. Where an officer authorized to remove a building from a street unlawfully makes sale of part of it, he becomes a trespasser *ab initio*: *Mussey v. Cahoon*, 34 Me. 74. So, where the whole of a chattel is sold, and not merely the debtor's estate in it where another has an interest therein in common with such debtor, the original seizure, though previously lawful, becomes a trespass: *Melville v. Brown*, 15 Mass. 82; *Weld v. Oliver*, 21 Pick. 559; *Waddell v. Cook*, 2 Hill (N. Y.) 47; *Waleh v. Adams*, 3 Denio, 125; *Fiero v. Betts*, 2 Barb. 633; *Sheppard v. Shelton*, 34 Ala. 652. So arresting one as insane, and, after an inquisition, failing to take the further steps required by statute, but nevertheless detaining the prisoner: *Coby v. Jackson*, 12 N. H. 526, although this savors somewhat of what in other cases has been held to be mere *non-feasance*.

So, using criminal process for the purpose of collecting a debt: *Shaw v. Spooner*, 9 N. H. 197. And generally where lawful process against the person has been made use of for the purpose of extorting money or procuring the prisoner to do an act against his will, the imprisonment is held to be such duress as to render the act void, even though the act itself is one which he ought in conscience to do: *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 Id. 386; *Breck v. Blanchard*, 22 Id. 303, citing the principal case. So it is a trespass *ab initio* where a lessor who has authority in law to enter peaceably and remove his tenant's goods after a notice to quit, abuses the authority by rough handling of the goods; as by tearing up carpets without removing the nails, or by throwing beds on the ground: *Whitney v. Sweet*, 22 N. H. 10, where the court say: "The power thus given by law is one liable to great abuse, and therefore must be strictly pursued;" and refer with approval to the doctrine of the principal case. So it is held to be a trespass *ab initio* for a landlord, after a lawful entry to terminate a lease, to make an illegal search for stolen goods: *Faulkner v. Alderson*, Gilmer (Va.), 221. So where an officer is guilty of misconduct with reference to the sale of property taken under lawful process. As by selling without complying with the requirements of the statute: *Ross v. Philbrick*, 39 Me. 29; *Wallis v. Truedell*, 6 Pick. 454. Or where a collector of taxes sells property for more than the amount of the tax and fails to render to the owner a written account of the surplus as required by law: *Blanchard v. Dow*, 32 Me. 557. Or where an officer sells distrained property without appraisalment or notice as prescribed by statute: *Blake v. Johnson*, 1 N. H. 91; *Kerr v. Sharp*, 14 Serg. & E. 397. So, where property taken under lawful process is sold at a different place from that named in the notice: *Hall v. Ray*, 40 Vt. 576. Or where the notice omits to name any place of sale: *Sutton v. Beach*, 2 Vt. 42. So where attached property is sold before the time authorized: *Knight v. Herrin*, 48 Me. 533. So where property is sold on execution on too short notice: *Carrier v. Esbough*, 70 Pa. St. 239. So where an impounded beast was sold twenty minutes before the expiration of the twenty-four hours after notice allowed by law: *Smith v. Gates*, 21 Pick. 55. So where the officer neglected to sell at the time advertised: *Bond v. Wilder*, 16 Vt. 393. So where property was detained beyond the time when it could be legally sold: *Brackett v. Vining*, 49 Me. 356; but see, to the contrary, *Ordway v. Ferrin*, 3 N. H. 69, above cited. So where property is sold on execution after sunset: *Carrick v. Myers*, 14 Barb. 9.

Many of these irregularities, it will be noticed, seem to have been mere omissions of duty, which, under the rule laid down in the *Six Carpenters' case*, would amount simply to *non-feasance* and would not render the officer abusing the process a trespasser *ab initio*. Hence, if the distinction there taken is sound, it is difficult to support several of these decisions. So, in the following cases, the abuse of authority which was held to render the party a trespasser *ab initio*, seems to have partaken to some extent of the character of mere *non-feasance*. Thus, where an officer has been held a trespasser for refusing to permit an execution-debtor to claim an exemption allowed by law: *Stevens v. Lawson*, 7 Blackf. 275; *Wilson v. Ellis*, 25 Pa. St. 238; *Freeman v. Smith*, 30 Id. 264; *Wilson v. McElroy*, 32 Id. 82; *Van Dressor v. King*, 34 Id. 201. So where an officer remains in a store too long after making an attachment of goods: *Rowley v. Rice*, 11 Met. 337. So where one took up cattle unlawfully straying, and omitted to leave with the pound-keeper the memorandum required by statute: *Sherman v. Branan*, 13 Met. 407. So where a guest at an inn was held a trespasser *ab initio* for refusing to leave when requested: *Adams v. Freeman*, 7 Am. Dec. 327.

It must be noted that the abuse of process which renders an officer a trespasser *ab initio*, relates back only to the inception of proceedings under that particular process. Hence, where an officer has made a valid attachment, and has conducted properly thereunder, his abuse of authority, under an execution issued pursuant to the attachment, will not render the entry and seizure under the attachment a trespass: *Heald v. Sargeant*, 15 Vt. 506. And, further, the officer will not be rendered a trespasser from the beginning of proceedings under the process, unless he was concerned in the original seizure: *Van Brunt v. Schenck*, 11 Johns. 377, where one custom-house officer made a lawful seizure of property, and another officer, not concerned in such seizure, afterwards misused the property. It is clear, also, that misconduct which will constitute an abuse of process must occur under the process. Hence it was held that where one who assisted an officer in executing a writ of replevin had been guilty of prior wrongful conduct in procuring the writ, he did not thereby become a trespasser: *Osgood v. Carver*, 43 Conn. 24.

For further citations of the principal case, see *Kendall v. Morse*, 43 N. H. 553; *McAden v. Gibson*, 5 Ala. 341.

BARNES v. HATCH.

[3 NEW HAMPSHIRE, 304.]

CREDITOR AS SUBSCRIBING WITNESS.—In a writ of entry against the administrator of a deceased insolvent, upon an instrument purporting to be the intestate's deed, the sole survivor of the subscribing witnesses, although a creditor of the intestate, must be called by the demandant to prove the deed, since he has no interest in the event of the suit.

DELIVERY OF DEED, WHAT IS NOT.—Where a grantor sent his deed to be recorded, declaring that it was made to prevent the lands being taken for an unjust debt, the grantee having no knowledge of the conveyance until after the grantor's death, it was held not to amount to a delivery.

WRIT OF ENTRY. The demandant alleged that Joseph C. Barnes being seized of the premises, conveyed the same to the demandant, on August 14, 1816, in fee and mortgage to secure the payment of \$2405. Plea, that the said instrument was not the deed of J. C. Barnes. It appeared that J. C. Barnes died insolvent in March, 1817, and that one of the tenants was his administrator. The sole surviving witness to the deed under which the demandant claimed, being a creditor of Barnes's estate, the demandant proposed not to call him, but to prove by other witnesses the handwriting of the grantor and of the subscribing witnesses to the deed; but the court being of opinion that the said subscribing witness was not interested in the event of the suit, decided that he must be called. Being called, the witness testified that he saw the intestate sign the instrument; that the demandant was not present; that the intestate delivered the deed to him, the witness, to take it to the office of the register

of deeds, directing him to keep the transaction secret, and declaring that said instrument was made to prevent the land being taken for an unjust debt. It did not appear that the instrument ever came to the demandant, or that he had any knowledge of its existence until the grantor's death. The demandant then offered what purported to be a note for \$2045, dated August 14, 1816, signed by J. C. Barnes, with proof of the maker's handwriting, but the paper being submitted to the jury upon the evidence, they found it to be a forgery. Verdict for the tenants, under the direction of the court, and subject to the court's opinion upon the facts.

H. Chase and R. Fletcher, for the demandant.

D. Steele and Woodbury, for the tenants.

By Court, RICHARDSON, C. J. It is objected, in this case, that the demandant ought not to have been compelled to call the subscribing witness to the deed, under which he claimed, because that witness being interested in the estate of Joseph C. Barnes, his interest inclined him to testify against the demandant. But we are of opinion, that this objection must be overruled. The creditors of Joseph C. Barnes may have an interest in the question whether the instrument, under which the demandant claims to hold the land, be the deed of Joseph C. Barnes; but it does not appear, that they have any interest in the event of this suit. One of the tenants is the administrator of the estate of Joseph C. Barnes; but that could not have made him a good tenant to the *precipe*, in this case; and for aught that appears, the other tenant is a total stranger to the title of Joseph C. Barnes. If the demandant prevail in this suit, the administrator may sell the land notwithstanding the recovery; and if the demandant fail he can do no more. The interest then of the creditors is an interest in the question and not in the cause. But it may be supposed, that the creditors have an interest in defeating this suit, because the estate of the intestate may be affected by the costs which the demandant may recover. But the costs of this suit can in no event be a charge upon that estate. The administrator might have abated the demandants' suit by a plea of non-tenure; and ought not to have taken upon himself the tenancy. But he has chosen to litigate a cause, which can settle nothing, and must therefore litigate it at his own expense. The estate has no interest in this suit, and can not be charged with the expense of it.

The next question is, whether the facts stated in this case

show a delivery of the instrument, on which the demandant rests his claim of title? It is not to be questioned, that a delivery is essential to the existence of the deed. It is not necessary, that the deed be delivered by the grantor into the hands of the grantee, it may be delivered to a third person for the use of the grantee; it may be delivered absolutely or conditionally; but there must be a delivery: Co. Lit. 36, a. note, 223; Perkins, secs. 137, 138, 142; 3 Coke, 35, 36; *Wheelwright v. Wheelwright*, 2 Mass. 447 [3 Am. Dec. 66]; *Hatch v. Hatch*, 9 Mass. 307 [6 Am. Dec. 67]; *Ruggles v. Lawson*, 13 Johns. 285 [7 Am. Dec. 375]; Shep. Touch. 57.

It has been decided, both in Massachusetts and in New York, that the sending of a deed to be recorded does not amount to a delivery: *Eames v. Phipps*, 12 John. 418; *Maynard v. Maynard*, 10 Mass. 456 [6 Am. Dec. 146]. And we are of opinion, that the sending of the instrument in this case to be recorded, coupled with the declaration, that it was made to prevent the bond from being taken to pay an unjust debt, does not amount to a delivery. There was nothing said or done in this case, which shows a delivery. It, therefore, becomes unnecessary to examine any other question, which the case may present.

Judgment for the tenants.

DELIVERY, WHAT CONSTITUTES.—See, on this subject, *Jackson v. Dunlap*, 1 Am. Dec. 100; *Wheelwright v. Wheelwright*, 3 Id. 66 and note; *Belden v. Carter*, 4 Id. 185; *Hatch v. Hatch*, 6 Id. 67; *Maynard v. Maynard*, Id. 146; *Verplank v. Sterry*, 7 Id. 348; *Jaques v. M. E. Church*, 8 Id. 447. That a deed not delivered though recorded, is invalid, see *Herbert v. Herbert*, 12 Id. 192.

EASTMAN v. FIFIELD.

[3 NEW HAMPSHIRE, 333.]

NOTE PAYABLE AT PARTICULAR TIME AND PLACE.—In an action on a note, payable at a particular time and place demand at such time and place need not be shown.

ASSUMPSIT on a note dated November 19, 1817, payable to the plaintiff or order "at Esqr. Jackman's in Bradford in the month of February, 1823, with interest," and signed by the defendants. It was agreed that the plaintiff was not at the place mentioned in February, 1823, and that no demand was made there before commencing suit, and the question was submitted to the court, whether the plaintiff was entitled to judgment.

H. G. Harris, for the plaintiff.

E. Webster, for the defendant.

By Court, RICHARDSON, C. J. The contract of the defendants, in this case, was to pay, in the month of February, 1823, and would have been performed by a payment at any time during that month. It may be, therefore, considered as a contract to pay on or before the last day of February, 1823; and the question to be decided is, whether, when a promissory note is made payable at a particular time and place, it is necessary that the payee show a demand at the place, in order to enable him to maintain an action?

It is well settled that when a promissory note is made payable at a particular place, on demand, no action can be maintained without a demand: *Sanderson v. Bowes*, 14 East, 500; *Dickenson v. Bowes*, 16 Id. 110; *Bowes v. Howe*, 5 Taunt. 30; *Bank of Niagara v. McCracken*, 18 Johns. 498. There has been, in England, a difference of opinion as to the nature of an acceptance of a bill of exchange, payable at a particular place. In the court of common pleas, the place, in such a case, has been held to be a part of the contract, and to render a demand at the place necessary to charge the acceptor or the drawer: *Callaghan v. Aylett*, 3 Taunt. 397; *Gammon v. Schwoll*, 5 Id. 344; *Ambrose v. Hopgood*, 2 Id. 61. In the court of king's bench, the place in such a case, has been held not to be a part of the contract, but a mere direction introduced for the convenience of holders of the bills, and it has been decided that a demand at the place is not necessary, to charge the acceptor: *Fenton v. Goundry*, 18 East, 459; *Wolcott v. Van Santvoord*, 17 Johns. 248.

In the case of *Rowe v. Young*, Brod. & Bing. 165, it was decided, in the house of lords, that, in an action against the acceptor of a bill of exchange, payable at a particular time and place, a presentment at the place must be averred and proved. It does not seem to have been settled, in England, whether, when a promissory note is made payable at a particular time and place, a demand is necessary. In the case of *Sanderson v. Bowes*, 14 East, 504, Lord Ellenborough admitted that there might be a distinction between a promise to pay, at a particular place, on demand, and a promise to pay at a particular time and place; because in the latter case, the promisor might aver that he was ready at the time and place; but in the former case, the time of payment depended upon the pleasure of the promisee. And in the case of *Carley v. Vance*, 17 Mass. 389, the supreme court of Massachusetts held that, when a promise was made to

pay, at a particular time and place, no demand was necessary; but if the promisor was ready, at the time and place, it was matter of defense. The same point was decided in the case of *Rugles v. Patten*, 8 Mass. 480. And we are, on the whole, of opinion that, when a note is made payable, at a particular time and place, no demand is necessary, and that there must be judgment for the plaintiff.

NOTE PAYABLE AT PARTICULAR BANK.—In *Berkshire Bank v. Jones*, 4 Am. Dec. 175, and *Woodbridge v. Brigham*, 7 Id. 85, it was held that where a note is payable at a particular bank, the promisor should appear there, and pay it, and no demand is necessary to charge the indorser, it being sufficient if the officers of the bank are there to receive the money. But in *Sullivan v. Mitchell*, 6 Am. Dec. 546, it was held that demand of payment at the bank was necessary, in order to make the indorser liable.

DAVIS v. HALL.

[3 NEW HAMPSHIRE, 392.]

THE PROPERTY IN GOODS SOLD DOES NOT VEST in the purchaser where anything remains to be done by the seller before delivery. Accordingly, where one purchased, and paid for a quantity of hay, to be weighed out of a mow, when he should see fit to move it, it was held that the property did not vest in him before the weighing, so as to enable him to maintain trover.

TROVER for a certain quantity of hay. Plea, the general issue. It appeared on the trial that on October 16, 1824, one Benjamin Stevens made and delivered to the plaintiff a certain writing, as follows: "October 16, 1824. David Davis bought of Benjamin Stevens three tons and six hundred of good English hay that is now in my barn in Middleton, to be weighed out of the large mow, any time when said Davis may see fit to move the same, valued at eight dollars per ton, twenty-six dollars and forty cents. Received payment by cash in full. Benjamin Stevens." Stevens died in October, and the defendant was appointed his administrator. In December, 1824, the plaintiff demanded the hay of the defendant, who refused to deliver it, and converted it to his own use. Verdict for the plaintiff, by consent, subject to the opinion of the court upon the facts.

Eastman, for the plaintiff.

Mason, for the defendant.

By Court, HARRIS, J. To maintain trover, the plaintiff must

prove that at the time of the conversion he had a property, either absolute or special, in the goods, which are the subject of the action, and must also show his actual possession, or at least his right to immediate possession of them. To prove these necessary facts, the plaintiff relies on the bill of parcels signed by Benjamin Stevens, produced at the trial. The question is, whether that bill shows any such property and possession, or right of possession, of the hay alleged to have been converted, in the plaintiff? Had it been for a specific lot of hay separated and distinct from all other property of Stevens, it might have been sufficient evidence. No act on the part of the seller would then have been necessary; and Davis might have taken the hay at his pleasure. When goods are sold, if anything remains to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, such right of property does not attach in the buyer as to enable him to maintain trover for the goods: *Hanson v. Meyer*, 6 East, 614; *Withers v. Lys*, 1 Holt, 18.

In the present instance, the hay for which the plaintiff paid was part of a large mow, and was to be weighed out to him. There was no specific appropriation of any part. Weighing and separating must precede delivery. This was to be, in part at least, the act of Stevens. Before the hay was weighed, Davis was not authorized to take it, by his own act, from the mow in which it was with other hay of Stevens. No part of the hay being particularly appropriated to Davis, there was not that separation from the general mass, and distinct specification and delivery, which the law requires, in order to vest the property of the hay in the plaintiff.

Upon a fair, legal construction, the bill of parcels amounts to nothing more than a contract to deliver the quantity of hay therein mentioned. If Stevens had weighed off several parcels each containing the stipulated quantity, he might have delivered either of them; and this would have been a performance of his contract: *Mucklow v. Mongles*, 1 Taunt. 318; *Austen v. Craven*, 4 Id. 644; *White v. Wilks*, 5 Id. 176; *Shepley v. Davis*, 5 Id. 617; *Owenson v. Morse*, 7 T. R. 64; *Merritt v. Johnson*, 7 Johns. 463 [5 Am. Dec. 289]; *McDonald v. Hewitt*, 15 Id. 349 [8 Am. Dec. 211].

It is the opinion of the court that the evidence offered in this case was altogether insufficient to support an action of trover. According to the agreement of the parties, the verdict must be set aside, and a verdict entered for the defendant.

COBURN v. PICKERING.

[3 NEW HAMPSHIRE, 415.]

A TRUST ATTENDING A SALE OF CHATTELS is a fraud as to creditors. RETENTION OF POSSESSION BY A VENDOR, after an absolute sale of chattels, is *prima facie*, and if unexplained, conclusive evidence of a secret trust; nor is it explained by showing that the sale was at first without any trust, but that the goods were left with the vendor under a subsequent contract that he should retain possession and pay rent for them.

WHETHER THERE WAS ANY TRUST is a question of fact for the jury; but the trust being proved or admitted, the fraud is an inference of law which the court must pronounce.

TRESPASS *de bonis asportatis*. Plea, the general issue. It appeared in evidence that the goods in question, which consisted of household furniture, were formerly owned by one Sampson, an inn-keeper, who, being indebted to Delano, his brother-in-law, sold the goods to him on August 20, 1823, in part payment of the debt. Before the goods were removed it was agreed between Sampson and Delano that they should be left and used in the tavern; and, to protect them from the creditors of Sampson, who was insolvent, Delano leased them for six months to the plaintiff who was a hired man in Sampson's employ; the lease being made simply to give Sampson and his family the use of the goods. It appeared from Sampson's testimony that the agreement to leave the goods in the house was no part of the contract of sale, but was entered into subsequently. The goods were delivered to the plaintiff and left and used in the house by Sampson and his family, as before, until they were seized, August 26, 1823, by the defendant, a deputy sheriff on an attachment against Sampson. The court directed a verdict for the defendant subject to the opinion of the court upon the whole case.

Handerson, for the plaintiff, contended: 1. That retention of possession of chattels by the vendor after a sale is not conclusive evidence of fraud, or fraud *per se*, but, at most, is only a circumstance from which, in connection with other facts, the jury may infer fraud, and referred to *Twyne's case*, 3 Co. 80; *Cadogan v. Kennet*, Cowp. 432; *Haselinton v. Gill*, 3 T. R. 620, note; *Dewy v. Boynton*, 6 East, 257; *Kidd v. Rawlinson*, 2 Bos. & P. 59; *Barrow v. Paxton*, 5 Johns. 258 [4 Am. Dec. 354]; *Beals v. Guernsey*, 8 Id. 446 [5 Am. Dec. 348]; *Portland Bank v. Stacey*, 4 Mass. 661 [3 Am. Dec. 253]; *Paget v. Perchard*, 1 Esp. N. P. 204; *Rob. Fraud. Con.* 546; *Low v. Haven*, 2 N. H.

13. 2. That *Edwards v. Harben*, 2 T. R. 594, was unsound owing to the fact that the court did not distinguish between the statutes of 13 Eliz. c. 5, and 27 Eliz. and the statute of 21 Jac. 1, c. 19. 3. That the facts in this case showed that there was no fraud in the transaction.

Kimball and Woodbury, for the defendant.

By Court, RICHARDSON, C. J. In this case the sale of the goods by Sampson to Delano was absolute and unconditional, and was made upon a valuable and adequate consideration; and the only question at the trial was, whether it was made *bona fide*? It was admitted that the goods were not removed, but were, by an agreement made immediately after the sale, left in the possession of Sampson, for his accommodation, and were in fact, used by him, as before the sale. The court being of opinion that the sale could not, in law, be deemed *bona fide*, directed the jury to return a verdict for the defendant; and to this direction the plaintiff has taken several exceptions, which we shall now proceed to consider.

In the first place, it is objected that the question, whether the sale was made *bona fide*, was a question of fact, to be settled by the jury, and not a question of law for the decision of the court. In order to render the question involved in the objection more intelligible, it may be useful to examine with attention, and ascertain with some precision, what absolute sales of goods are to be considered as made *bona fide*, and what *mala fide*, within the meaning of the rule, which requires all sales of goods to be made *bona fide*, in order to be valid as against creditors. A much broader view of the subject might be taken; but in the present case it is not necessary to extend our inquiries beyond absolute sales.

A sale of goods in order to be considered as made *bona fide* with respect to creditors, must be made without any trust whatever, either express or implied. This is the doctrine of *Twyne's case*, and we are not aware that the soundness of it has ever been questioned. It is not permitted to a debtor to convey away his goods, by sale, with any secret understanding between him and the vendee, that the goods shall be holden for the benefit of the vendor, in any way whatever. The nature of the benefit reserved in the sale is immaterial. It matters not whether the benefit is to consist in the use of the goods, or in some other favor to be shown by the vendee. Anything of this kind is a trust, and what the law denominates a fraud. "For

that," says Lord Coke, "which between the donor and donee is called a trust *per nomen speciosum*, is in truth, as to all creditors, a fraud." Nor are the grounds on which this doctrine is founded unsatisfactory. All conveyances with secret reservations for the benefit of the vendor, tend directly to hinder and delay creditors. They hold out false colors and false appearances, and mislead and deceive creditors. They give to the property of the vendor the appearance of belonging wholly to another, when in truth he has an interest in it, concealed under the trust. It is for this reason that a trust of this kind is in law a fraud. As the obvious tendency of these reservations and trusts is to deceive and defraud creditors, it has not been deemed necessary to stop to inquire into the particular views or motives of individuals in each case; but all courts, relying on the presumption, that every man intends the probable consequences of his acts, have at once pronounced all these trusts to be frauds, not only within the meaning of the 13 Eliz. c. 5, but at common law; and have held that sales without any trust whatever, and such sales alone, are to be considered as *bona fide* sales with respect to creditors.

The nature of a *bona fide* sale may be further illustrated by an examination of the two species of trusts, mentioned by Lord Coke in *Twyne's case*: "Every trust," says he, "is either expressed or implied. An express trust is, when in the gift or upon the gift, the trust by word or writing is expressed. A trust implied is, when a man makes a gift without any consideration, or on a consideration of nature or blood only." And to explain the nature of an implied trust, he says: "When a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust between them, and the donee would, in consideration of such gift being voluntarily and freely made to him, and also, in consideration of nature, relieve his father or cousin, and not see him want, who had made such gift to him." Thus, it seems, that whenever a man in debt transfers his property, without a valuable consideration, as such a transfer tends to injure his creditors, the law presumes the trust, and pronounces the transfer fraudulent. No man is permitted to give away his property to the injury of his creditors. Every such gift is a violation of good faith, and, in law, a fraud. It is not necessary that fraud should have been actually intended. The language of the law is, that no man shall be heard to say, that he acted honestly and with good faith, in giv-

ing away property, which, in equity and good conscience, ought to have gone to pay his just debts.

Express trust may be created, not only by writing or by parol, but by a secret understanding between the parties, when nothing is said or written on the subject; but, in whatever way they may be created, their nature is the same. Such being the nature of secret trusts and of *bona fide* sales, we will now proceed to inquire how far possession of a chattel by the vendor, after a sale, is evidence of a trust.

After a most attentive and careful examination of the books on this subject, we have not been able to entertain a doubt, that the true rule, to be deduced from all the adjudged cases, is, that when the sale is absolute, possession and use of the goods afterwards by the vendor, is always *prima facie*, and, if unexplained, conclusive evidence of a trust: *Edwards v. Harben*, 2 T. R. 587; *Twyne's case*, 3 Coke, 86; *Hamilton v. Russell*, 1 Cranch, 300; *Dawes v. Cope*, 4 Binn. 258; *The United States v. Hoe*, 3 Cranch, 73; 1 Taunt. 381; 1 Pick. 295; 4 John. 337; 2 Buls. 225; 1 Esp. N. P. C. 205; 1 Campb. 332.

To this rule it can hardly be said, that any exception is to be found in the books. For the cases of sales of ships at sea seem not to come within the spirit of the rule, until the vessels arrive in port; and then the rule itself applies: *Haines v. Corliss*, 4 Mass. 659; 8 Id. 287; 4 Id. 661. So cases of goods, bought at a sheriff's sale, and afterwards loaned to the execution debtor, have been held not to come within the rule: *Kidd v. Rawlinson*, 2 B. & P. 59; *Cole v. Davies*, 2 Ld. Raym. 724; 4 Taunt. 823. And the case of *Steel v. Brown & Parry*, 1 Taunt. 381, where it was decided, that a bill of sale of goods made for a valuable consideration, unaccompanied with possession, was valid as against the vendor, and as against a creditor, with whose knowledge it was made, is not within the rule; because the assent of the creditor puts him on the ground of a party to the sale.

In no one of the cases, cited by the plaintiff's counsel, is there a decision not to be reconciled with this rule: *Cadogan v. Kennet*, Cowper, 432, and *Haselinton v. Gill*, 3 T. R. 620, note, are cases of marriage settlements, and the decisions rest on grounds peculiar to that species of contract. In those cases, possession is perfectly consistent with a *bona fide* sale, and, of course, furnishes no evidence of fraud: *Barrow v. Paxton*, 5 John. 258 [4 Am. Dec. 354], was a case of mortgage and not an absolute sale; and the sale of the goods was questioned, by a subsequent purchaser, and not by a creditor. The decision in

that case, does not, therefore, bear upon the point we are now considering.

In the case of *Beals v. Guernsey*, 8 John. 446 [5 Am. Dec. 348], the general rule, which we have laid down, was admitted; but an explanation of the possession, which the court deemed satisfactory, was given. That decision, therefore, is so far from being repugnant to the rule, that it is founded upon the rule: *Haven v. Low*, 2 N. H. 13 [9 Am. Dec. 25], was a case of mortgage, and the decision is not directly in point. It was decided, that when the possession of goods mortgaged is retained by the mortgagor, that circumstance alone is not conclusive evidence of fraud. The decision was, therefore, in perfect accordance with the rule we have laid down. For when the court say, that the possession of the goods is not conclusive evidence, all that is intended is, that it "may be rebutted or explained."

We have no hesitation in saying, that there is no contradiction in the decisions on this point. All the cases are reconciled by the distinctions we have stated. There may be some loose and inaccurate *dicta* of judges, in delivering opinions, which, if taken separately, and understood in a broad sense, without any reference to the particular circumstances of the case under consideration, may seem to be not easily reconciled with the rule; but in the decisions, it is most confidently believed, that no clashing is to be found.

But it is said that all the decisions, from which we deduce this rule, are founded upon error and mistake, in confounding the statutes of 13 Eliz. c. 5, and the 21 Jac. 1, c. 19. If there be an error of this sort, it is one, to which the maxim of *communis error facit jus* may be most happily applied; for it seems to have been the error of all the English courts, and of all the courts in this country, whose attention can be ascertained to have been directed to this subject. There cannot, however, have been any such mistake. For *Twyne's case*, which, in substance contains the rule we have laid down, and has ever since been considered and followed as sound law, was decided more than half a century before the statute of 21 Jac. 1, c. 19, was made.

And independent of authority, the rule itself seems to us to rest upon grounds the most satisfactory. An agreement to let a vendor retain the possession and use of the goods, after an absolute sale, is not a common and ordinary thing in the course of business. It is, therefore, calculated to excite suspicions; and it is the bounden duty of all courts, for the safety and pro-

tection of creditors, to call upon and hold the vendee, in all such cases, to explain clearly and satisfactorily, how an absolute sale could have been *bona fide*, and yet the vendor retain the use and possession. Such a separation of the use from the title to personal property, would afford a cover for innumerable frauds against creditors, if they were, by law, compelled to unravel each transaction and show actual fraud. It would rarely be in their power to do this in the most fraudulent cases. All would be contrived originally, by the parties to the fraud to meet the attack; and the fraud would be carefully covered by fortresses impregnable by any evidence which it would be in the power of the creditors to bring against them. But let the burden of proof be thrown upon the vendee, in these cases, to show that the sale was *bona fide*, if it really were so, he, being a party to the transaction, knows where the evidence is and can easily show the fact; and if it were not *bona fide*, the fraud can rarely escape detection.

It thus seems to us, to be settled as firmly as any legal principle can be settled, that the fraud, which renders void the contract, in these cases is a secret trust, accompanying the sale, and that in cases of absolute sales, possession and use by the vendor after the sale, is always *prima facie*, and if unexplained, conclusive, evidence of a secret trust. It is, therefore, very clear that fraud is sometimes a question of fact, and sometimes a question of law. When the question is, was there a secret trust, it is a question of fact. But when the fact of a secret trust is admitted, or in any way established, the fraud is an inference of law, which a court is bound to pronounce. This is the doctrine of *Edwards v. Harben*, 2 T. R. 589; is strongly recognized in *Sturtevant v. Ballard*, 9 Johns. 339 [6 Am. Dec. 281]; was laid down in *Stone v. Grubham*, 2 Buls. 225; was distinctly acknowledged to be law by the supreme court of the United States, 1 Cranch, 318, and by the supreme court of Massachusetts, 1 Pick. 295; and of Pennsylvania, 4 Binn. 258.

Upon these principles, the question we are now considering is easily settled. It was admitted that the sale of the goods by Sampson to Delano was absolute, and that Sampson retained the possession, and had the use of the goods as before the sale. There was no question as to the facts. The question was, whether, upon these facts unexplained, the sale could, in law, be deemed to have been made *bona fide*. The whole dispute turned upon a matter of law, and not of fact. And so with respect to the explanation which the plaintiff gave of the transaction, and upon which he relied as rebutting the presumption

of a secret trust, arising from the possession and use of the goods by the vendor after the sale, the fact that the agreement as to the possession was made after the sale was completed, was taken for granted; and the question was, whether in law it was sufficient to repel the presumption arising from the possession and use of the goods.

We are, therefore, of opinion that there was no question of fact in dispute between the parties upon the trial which could have been submitted to the jury, and that this exception must be overruled. But it is further excepted to the directions of the court that the explanation given by the plaintiff was, in law, sufficient to repel the presumption arising from the possession and use of the goods; and we will now proceed to examine this exception. The ground which counsel take is, that the original contract, not being fraudulent at the commencement, shall not become so by matter *ex post facto*. The principle may be conceded; but how does it apply in this case? *Lady Lambert's case*, which has been cited in Shep. Touch., was a mortgage, and is said to have been made *bona fide*, and for a valuable consideration. In such case, there could be no doubt that the principle applied. But before that principle can be applied to this case, it must be shown that the sale was *bona fide*, and not fraudulent, at the commencement. Now, it happens that this is the very matter in controversy. The only dispute is, whether the sale can be considered as made *bona fide*; and until that question is settled, the principle cannot be applied.

Another answer to this objection is, that there is a wide difference between a mortgage of land and chattels real, and mortgages of mere goods and movables. In the one case, the title deeds are the proper documents to show the title; and possession cannot mislead. But in the case of personal chattels, possession is the common evidence of title. In a mortgage of real estate it is not, therefore, a badge of fraud that possession does not follow the deed: Rob. on Fraud. Cont. 556. In that case, we may safely apply the principle, that if the transaction be not fraudulent at the commencement, it shall not become so by matter *ex post facto*.

But, in relation to sales and mortgages of personal property, different rules are adapted in this respect. In order to increase the difficulties of fraud, courts have thought it expedient to require certain signs of good faith, which cannot be reconciled with fraudulent purposes. One of these signs is, that possession shall accompany and follow the sale of personal chattels.

There has been a certain constant exertion, by individuals, to evade this rule, and to separate the possession and use of goods, in these cases from the title, in such a manner as to render the transaction apparently *bona fide*. But, from the days of Queen Elizabeth to this hour, those exertions have been met and resisted by all courts, where the common law is known and and respected, with all the firmness and uniformity, which the importance of the rule has demanded. No rule could have been devised, better calculated, to check fraud. Nothing has been found so embarrassing to those who have been disposed to act without good faith. As soon as it was settled, that not the original contract alone, but the whole transaction and its tendencies, were to be considered, and a judgment of the original intentions formed, not from evidence of actual intention, but from the subsequent conduct of the parties; it gave the creditors the means of detecting fraud. And when to this was added the rule, that possession and use, by the vendor, should, if unexplained, be conclusive evidence of fraud, it threw the burden of proof upon the parties to the sale, to clear it from suspicion, and it became in the highest degree, difficult to escape detection in a fraudulent transaction. These rules have been in constant use for more than two centuries, and experience has given an ample illustration of the wisdom, with which they were devised and of the efficacy, with which they may be applied; but the principle, for which the learned counsel of the plaintiff has contended, that the original contract is to form the criterion, by which the honesty of the sale is to be determined, stands in direct opposition to these rules. Nor is this all. It stands wholly unsupported by authority, and seems to have made its appearance for the first time in this case. To give it any countenance in our courts, would, in our judgment, take from creditors some of the most efficient means of detecting fraud, which human ingenuity has been able to invent. We therefore think that the objection must be overruled.

One other circumstance has been mentioned as sufficient to clear this case from all suspicion of fraud; and that is, that a rent for the use of the goods was agreed to be paid; and the case of *Watkins v. Burch*, 4 Taunt. 823, seems to have been cited in support of this proposition. But, as we have before remarked, that this was a case of sale by the sheriff, and the actual payment of rent was thought to strengthen the evidence of the fairness of the transaction; because such payment was not likely to have followed a collusive purchase. But, in a case

like the present, of an absolute sale by the owner of the goods himself, to his debtor, an agreement by the vendor, to pay rent for the goods, is not only not inconsistent with that species of trust, which the law deems a fraud, but may, in fact, constitute a part of the agreement, on which a trust arises. The case is also distinguishable from this in a very important particular. There the rent was actually paid. Here there was nothing but an agreement to pay.

We have now considered all the exceptions which have been taken in this case. We have examined them with the utmost attention, not so much because we deemed the law to be doubtful or obscure, as because such an examination seemed to be due from us, to the very able and ingenious argument of the plaintiff's learned counsel. And after the best consideration we have been able to give the subject, we have no hesitation in saying, that the grounds on which the plaintiff has rested his motion for a new trial, are, in our judgment, insufficient to sustain it, and that the defendant is legally entitled to.

Judgment on the verdict.

RETENTION OF POSSESSION AFTER SALE.—*Coburn v. Pickering* is regarded as a leading case in New Hampshire upon the subject of secret trusts in sales of chattels, and upon the effect of a retention of possession by the vendor as evidence of such a trust. Says Bellows, C. J., in *Putnam v. Osgood*, 52 N. H. 148: "The principles upon which this question is to be decided may be detected by considering the rules which govern the retention of the possession by the vendor on the absolute sale of goods. There, the retention of the possession by the vendor is always *prima facie*, and, if unexplained, conclusive evidence of a secret trust. This is the doctrine of *Coburn v. Pickering*, 3 N. H. 415, 425, which has since been followed, and must be regarded as the settled law of this state: See *Coolidge v. Melvin*, 42 N. H. 510, and cases cited; and it is equally well settled, that, the trust being established, the sale is to be regarded as fraudulent and void as against creditors. Whether there was a trust, is a question of fact; but the trust being established, it is a conclusion of law that the sale is fraudulent and void as to creditors. Ordinarily, in the case of an absolute sale of goods, a trust will be presumed, with us, from the mere retention of possession by the vendor. In some states, as in Vermont and many others, the presumption is conclusive, in others it is *prima facie* only, and may be rebutted by showing the sale to be *bona fide*, as in Massachusetts and some other states. The decisions, indeed, in this country are very conflicting and unstable on this subject. In New Hampshire, however, since the decision in *Coburn v. Pickering*, the rule has been steadily adhered to, that the retention of the possession by the vendor is always *prima facie*, and, if unexplained, conclusive evidence of a secret trust. By this it is not meant that the possession may be explained by showing that the sale was really in good faith; but a satisfactory reason must be shown for allowing the vendor to retain the possession of the goods, else it will be presumed that it was intended that he should have the use of them. What would be a sufficient explanation of the

possession, as a general principle, has not been determined in this state. It has been decided, however, that it is not a sufficient explanation that the sale was at first without any trust, but that soon after, and before the goods were removed, it was agreed that the vendor might retain and use them, and pay rent therefor: *Coburn v. Pickering*, before cited." The same learned judge, also, comments upon and approves the doctrine of the principal case in *Coolidge v. Martin*, 42 N. H. 510, where the subsequent decisions on this subject in New Hampshire are carefully reviewed. For other decisions citing the principal case, and approving the doctrine laid down in it, see *Parker v. Pattee*, 4 N. H. 176; *Paul v. Crooker*, 8 Id. 288; *Page v. Carpenter*, 10 Id. 77; *Morse v. Powers*, 17 Id. 286; *Shaw v. Thompson*, 43 Id. 130; *Putnam v. Osgood*, 51 Id. 200; 56 Id. 254. See, also, the American note to *Twyne's case*, 1 Sm. Lea. Cas. 63, where Chief Justice Richardson's opinion in the principal case is specially referred to "as containing a very luminous exposition of this subject."

It was held, however, in *Boardman v. Cushing*, 12 N. H. 105, that "the broad principle of *Coburn v. Pickering*, * * * however proper it may be in the case of attachment (and where the vendor, whose claim is alleged to be fraudulent by reason of a secret trust, appears as plaintiff or defendant in a litigation respecting the title to the property) cannot be applied in a suit where the party who contests the sale as fraudulent, summons the vendee as a trustee of the vendor, and has an opportunity, if he sees fit, to examine him on oath relative to the terms, conditions and circumstances attending the sale." It was there decided, accordingly, that where a party in order to secure a just debt takes an absolute conveyance of personal property, and a creditor summons the vendee as trustee of the vendor, fraud is not to be inferred, conclusively, from the form of the conveyance alone; and unless there are other circumstances showing an express design to delay or defeat creditors, the trustee must be discharged if the plaintiff does not pay or tender the debt secured by such conveyance.

As to the effect of a retention of possession by a vendor of chattels in other states: see *Clayborn v. Hill*, 1 Am. Dec. 452; *Sturtevant v. Ballard*, 6 Id. 281 and note; and *Clow v. Woods*, 9 Id. 346 and note.

WOART v. WINNICK.

[3 NEW HAMPSHIRE, 473.]

RETROSPECTIVE STATUTE.—An act repealing a statute of limitations is, with respect to actions pending which are barred by the statute, retrospective, unconstitutional and void.

ASSUMPSIT on a note dated October 11, 1817, and payable in six months. The action was commenced April 12, 1825, and was entered here in September of that year. Plea, that the cause of action did not accrue within six years, and a general demurrer to the plea and joinder therein. The question presented appears in the opinion.

Moody and Crosby, for the plaintiff.

Lyford, for the defendant.

By Court, RICHARDSON, C. J. The statute of June 30, 1825, entitled "an act for the limitation of actions, and preventing vexatious suits," is by its express terms applicable only to actions commenced after its enactment; and the last section of that act repeals all the statutes, which were previously in force, for the limitation of personal actions. If, therefore, the repealing clause of that statute can take effect with respect to actions which were pending on the thirtieth of June, 1825, there is now no statute of limitations which can be held to be a bar to such actions. But it is contended on the part of the defendant that the repealing clause of that statute is, so far as regards actions then pending, repugnant to the constitution of this state, and therefore wholly inoperative; and the question which this case presents for our decision is, whether that clause in the statute is in that respect warranted by the constitution. The clause in the constitution upon which the defendant relies, is the twenty-third article in the bill of rights: "Retrospective laws are highly injurious, oppressive, and unjust. No such law, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." We shall therefore proceed to examine that article, and endeavor to ascertain its meaning, and to see in what cases, and to what extent, it is to be considered as a limitation of the power of the legislature.

It is evident from this article in the bill of rights that there are different kinds of retrospective laws; for two species are here enumerated retrospective laws for the decision of civil causes, and retrospective laws for the punishment of offenses. We shall, in the first place, advert to retrospective laws for the punishment of offenses, or to *ex post facto* laws, as they are usually called; because their nature seems to be better defined and settled in the books than that of any other species of retrospective laws; and the general principles, which have been settled in relation to that kind, may throw some light upon the nature of retrospective laws, for the decision of civil causes, and aid us in determining whether the repealing clause in the statute, which we are now examining, is a retrospective law for the decision of civil causes, within the meaning of that article in the bill of rights. Blackstone, in his commentaries, describes a law as *ex post facto*, "when, after an action indifferent in itself is committed, the legislature, then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it:" 1 Black. Com. 46.

CHASE, J., in the case of *Calder v. Bull*, 3 Dall. 386, gives a
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much fuller description of *ex post facto* laws, than that of Blackstone. He lays it down, that every law which makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; or, which aggravates a crime and makes it greater than it was when committed; or, which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; or, which alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender, is an *ex post facto* law.

And the terms in which *ex post facto* laws are denounced and proscribed in the constitution of other states in the union, may aid us in forming an accurate conception of their nature. The constitution of Massachusetts contains a declaration, that "laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive and inconsistent with the fundamental principles of a free government." In the constitution of North Carolina it is declared, "that retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty." In the constitution of Mississippi it is provided, that "no person shall be punished but in virtue of a law, established and promulgated prior to the offense, and legally applied." The constitution of Tennessee declares, that "the laws made for the punishment of facts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free government; wherefore, no *ex post facto* law shall be made."

It is worthy of remark that it is not declared in the article of our bill of rights, which we are now considering, that no retrospective law ought to be made for the trial of criminal causes, but that no such laws ought to be made for the punishment of offenses. A statute on which a prosecution for a crime depends may be repealed, and the prosecution thus defeated; yet, although the act effecting such repeal is a retrospective law for the decision of the cause, it is not within the prohibition of this article, because it is not a retrospective law for the punishment of an offense. No statute is to be considered *ex post facto* which mollifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment,

or change the rules of evidence for the purpose of conviction: *The case of Ross*, 2 Pick. 165; 3 Dallas, 391.

It therefore seems that a retrospective law for the punishment of an offense, within the meaning of our bill of rights, must be a law made to punish an act previously done, or to increase the punishment of such an act, or in some way to change the rules of law in relation to its punishment, to the prejudice of him who committed it. In other words, it must be a law establishing a new rule for the punishment of an act already done. The only object of this clause in the bill of rights was to protect individuals against unjust and oppressive punishment. Therefore, while it withholds the power to make retrospective laws for the punishment of offenses, it leaves to the legislature the power to make such laws at its discretion for the mitigation of punishment. A very different language is used in the other clause of this article in the bill of rights. No retrospective law should be made for the decision of civil causes. Here the object of the clause is to protect both parties from any interference of the legislature whatever, in any cause, by a retrospective law. A law for the decision of a cause is a law prescribing the rules by which it is to be decided; a law enacting the general principles by which the decision is to be governed. And a retrospective law for the decision of civil causes, is a law prescribing the rules by which existing causes are to be decided upon facts existing previous to the making of the law. Indeed, instead of being rules for the decision of future causes, as all laws are in their very essence, retrospective laws for the decision of civil causes are, in their nature, judicial determinations of the rules by which existing causes shall be settled upon existing facts. They may relate to the grounds of the action, or the grounds of the defense, both of which seem to be equally protected by the constitution. And as, on the one hand, it is not within the constitutional competency of the legislature to annul by statute any legal ground on which a pending action is founded, or to create any new bar by which such a new action may be defeated; so, on the other hand, it is believed that no new ground for the support of an existing action can be created by statute, nor any legal bar to such an action be thus taken away. A statute attempting any of these things seems to us to be a retrospective law for the decision of civil causes within the prohibition of this article in the bill of rights. It is the province of the legislature to provide rules

for the decision of future causes. It is the province of courts to determine by what rules existing causes are to be decided.

There are several adjudged cases which seem to us clearly to show, that this is the true meaning of the clause in the bill of rights, which we have now under consideration.

In the case of *Dash v. Van Kleeck*, 7 John. 477 [5 Am. Dec. 291], where the nature of retrospective laws was much discussed, the question arose in the following manner: A statute of the state of New York, passed in the year 1801, made it the duty of the sheriff to allow prisoners the liberties of the gaol, on their giving bond with sufficient sureties, with a condition, "that such prisoner shall remain a true and faithful prisoner, and shall not, at any time, nor in any wise, escape or go without the limits of the liberties of the prison, until discharged by due course of law." In the case of *Tillman v. Lansing*, 4 John. 45, which was decided in February, 1809, the supreme court held, that in an action against the sheriff for the escape of a prisoner, who had given bond under the statute above mentioned, a voluntary return of the prisoner within the limits, before suit brought, was no defense. In April, 1810, a statute was passed, declaring the law to be, that notwithstanding the acts relative to gaols and gaol liberties, a return or reception, before suit brought for an escape, should be a defense as at common law. The action of *Dash v. Van Kleeck*, was commenced before the last mentioned statute was passed, and the question was, whether that statute could govern that case? Three of the judges held, that to apply that statute to the case then before them, would be to give it a retrospective operation, which, although not prohibited expressly by any clause in their constitution, was, upon general principles, wholly inadmissible. They, therefore, decided against the letter of the statute, that it could not have been intended to apply to causes pending at the time it was enacted. It is believed that nobody can doubt, that such a law must, with respect to actions pending when it was passed, be considered as a retrospective law for the decision of civil causes; for, applied retrospectively, it would create a new bar to an existing action, and if such a law be not within the prohibition intended, it is difficult to conceive what would be.

In the case of the *Society v. Wheeler*, 2 Gallison, 105, a writ of entry was brought in the circuit court of the United States in the year 1807, to recover a tract of land in Westmoreland, in this state. The tenants alleged that they had been in possession of the land, under a supposed legal title, more than

six years before the commencement of the action, and had made improvements; and they claimed to be allowed for the increased value of the land, a sum equal to such increased value. The jury found the value of the improvements, but the demandants moved for judgment, notwithstanding the verdict with respect to the improvements, on the ground that the statute of June 19, 1805, was, in respect to that case, a retrospective law prohibited by the constitution, the possession of six years not having elapsed after the making of the statute, and before the commencement of the action, Story, J., held that, "upon principle every statute, which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective," and that the statute of June 19, 1805, would, if applied to that case, be a retrospective law for the decision of a civil cause, within the prohibition of our constitution. He, therefore, held, that the statute could apply only to cases where there had been possessions for six years after the passage of the statute.

In *Holden v. James*, 11 Mass. 396 [6 Am. Dec. 174], it was decided in the supreme court of Massachusetts, that the legislature could not suspend the operations of a statute of limitations in favor of one individual only. In delivering the opinion of the court, Jackson, J., said: "It would not be an exercise of greater power to enact, that Mr. James, the defendant in this suit, should not be held to answer to any suit commenced against him, as administrator, after the expiration of two years from the time of his accepting that trust, than it would be to enact, that he should be held to answer to any such suit commenced within six years. It could not, in either case, be properly considered a suspending of the law, which limits such actions to four years, but it would be enacting a new and different rule for the government of one particular case."

The case of *Walter v. Bacon*, 8 Mass. 468, was debt upon a bond, with a condition that Bacon should continue a true prisoner in the goal at Cambridge. Soon after the bond was made, Bacon went into a private house within the limits of the prison, to which he had been committed, and so according to the decision of the supreme court in the case of *Baxter v. Taber*, 4 Mass. 361, committed an escape; and a suit was accordingly brought against him on the bond. After all this, the legislature passed an act, declaring that no person having given bond

to continue a true prisoner, should be considered as having committed an escape in consequence of having entered upon any private estate; and the question was, whether that act could apply to that case? It was decided that the act might be so applied, without any violation of the constitution of that state. But it appears by the remarks of Sewall, J., in *Patterson v. Philbrick*, 9 Mass. 153, that some of the judges did not concur in this decision; and it is very much to be regretted, that the opinions of the learned and able judges, who considered the case, do not more fully appear in the report. The decision seems to be in direct opposition to the principles laid down by Kent, C. J., in *Dash v. Van Kleeck*, and approved by Story, J., in the *Society v. Wheeler*, 2 Gallison, 139. But whether such a law was repugnant to the constitution of Massachusetts or not, it is unnecessary to inquire in this case. It is believed that such a law, so applied, would, without doubt, be considered in this state as a retrospective law for the decision of civil causes, and repugnant to our constitution.

In the case of *Merrill v. Sherburne*, 1 N. H. 199 [8 Am. Dec. 52], a statute, purporting to grant a new trial in a civil cause, after a final judgment had been rendered, was held to be a retrospective law, within the meaning of this clause in the bill of rights, and wholly inoperative. But it has been decided in this court, that an action brought upon a statute to recover a penalty, might be defeated by a repeal of the statute after the action was commenced: *Lewis v. Foster*, 1 N. H. 61. In that case however, no objection was taken by counsel to the validity of the repealing statute, nor was its validity examined by the court. It will, therefore, remain to be decided hereafter, whether such an action can be so defeated, consistently with this clause in the bill of rights. For an action of debt to recover a penalty is a civil cause: 1 Gallison, 179; 2 Bos. & P. 532, note. And he, who first commences an action for a penalty, has a vested right: 6 Johns. 101. The act which repeals the law on which the action is founded, establishes a new rule for the decision of an existing cause; and it will deserve great consideration, whether with respect to such causes, it must not be adjudged repugnant to the constitution and void. But the point yet remains undecided.

We have adverted to these various cases, in order to illustrate the general nature of retrospective laws. There is no safer method to ascertain the correctness of a particular principle than a close examination of it in its application to various par-

ticular cases. The more widely this can be done the more accurately may its soundness be tested. No general principle can be safely established by an examination of its operation in one instance only. The most attentive examination we have been able to give to the clause in the constitution, which we are now considering, has satisfied us that it was intended to prohibit the making of any law prescribing new rules for the decision of existing causes, so as to change the ground of the action or the nature of the defense. We think that such was the intention, because it is fit and proper that the prohibition should go to that extent. Retrospective laws of that kind deserve to be denounced, as they are denounced in our constitution, as highly injurious, oppressive and unjust. They have been denounced by the most sound and intelligent jurists and statesmen in every age. We think that such was the intention, because the establishment of new rules for the decision of existing cases is, in its nature, an exercise of judicial power—a power which the thirty-seventh article of the bill of rights declares ought to be kept separate from, and independent of, the legislative power; and because the union of the legislative and judicial power in the same branch of the government is, in its very essence, tyranny. We think that such was the intention, because it is most manifestly injurious, oppressive and unjust; that after an individual has, upon the faith of existing laws, brought his action or prepared his defense, the legislature should step in, and, without any examination of the circumstances of the cause, arbitrarily repeal the law upon which the action or the defense had been rested. Such an exercise of power is, in our opinion, wholly irreconcilable with the spirit of our institutions, and with the great principles of freedom, upon which they are founded.

We will now consider how this doctrine of retrospective laws applies to the case now before us. Woart brought his action against Winnick on the twelfth of April, 1825, upon a note made in the year 1817. By the law as it stood when the action was brought, Winnick had a right to insist upon the lapse of six years after the promise, and before the commencement of the action, as a legal defense to the action. But if the last section of the statute of June 30, 1825, repeals the statute on which that defense rested, he has now no defense in that respect. That to give the statute that construction and operation in relation to this cause would be to make it a law prescribing a new rule for the decision of an existing cause, is much too

clear to need an elucidation. By the rule of law in force when this action was commenced, this defendant is entitled, upon these pleadings, to judgment. If that rule of law is now repealed, and no longer the rule, the plaintiff is, upon the same pleadings, entitled to judgment. And we are of opinion that the statute of June 30, 1825, does not, so far as respects actions then pending, repeal the statute of limitations which had been previously in force. We think, in the first place, that the legislature had no constitutional authority so to repeal them. And in the next place, we are satisfied that it was not the intention of the legislature to repeal those statutes, with respect to existing actions. We do not believe that this was the intention of any individual in either branch. We draw this conclusion from the circumstance that the statute of June 30, 1825, adopts not only the principles, but the language of the former statutes of limitation, and makes no change in the rule of law. The object seems to have been merely to bring into one what was before contained in two statutes, with the addition of one or two new rules of law in relation to actions against executors and administrators. We think that the intention of the legislature was, that the rules of law contained in the repealed acts should remain unaltered, and be applied to all the cases, as well those that were pending as those that were to be afterwards commenced. Upon any other view of the statutes, it would be questionable, whether the statute of June 30, 1825, would be now applied consistently with the constitution to any action since commenced, the cause of which existed when the act was passed. But by considering that act as merely re-enacting an existing rule, all objection vanishes. It is probable that the sixth section of that statute can be applied only to those who may become executors or administrators after the passage of the statute. This construction of the repealing clause in the statute is, we concede, contrary to the letter. But it is required by the constitution. It is in accordance with what we believe to have been the intention of the legislature. It is justified by the soundest rules of construction, and is warranted by many authorities entitled to the highest respect: *Medford v. Learned*, 16 Mass. 215; *Williams v. Pritchard*, 4 T. R. 2; 7 Johns. 477; *Coults v. Jeffries*, 4 Burr. 2460; *Whitman v. Hapgood*, 10 Mass. 437; 2 Gall. 105; 2 Shower, 17; 2 Mod. 310; 2 Lev. 227; 2 Jones, 108; 1 Vent. 330; 8 Mass. 423.

We are, therefore, of opinion that there must be judgment for the defendant.

RETROSPECTIVE STATUTES, VALIDITY OF.—The authority of this case upon this subject has been recognized and approved in many subsequent decisions in New Hampshire, upon analogous questions: *Dow v. Norris*, 4 N. H. 16; *Roby v. West*, Id. 287; *Clark v. Clark*, 10 Id. 380; *Towle v. Eastern Railroad*, 18 Id. 547; *Howard v. Hildreth*, Id. 107; *Pickering v. Pickering*, 19 Id. 389; *Gilman v. Cutts*, 23 Id. 382; *Kennett's petition*, 24 Id. 149; *Willard v. Harvey*, Id. 351; *Rich v. Flanders*, 39 Id. 304; *Rockport v. Walden*, 54 Id. 167; see, also, *Adams v. Hackett*, 27 Id. 294; *Lackeman v. Moore*, 32 Id. 413; *Little v. Gibson*, 39 Id. 505; *Morgan v. Perry*, 51 Id. 559; *Railroad Co. v. Elliot*, 52 Id. 387; *Merriell v. Scherburne*, 8 Am. Dec. 52 and note; *Dash v. Van Kleeck*, 5 Id. 291 and note. For an extended examination of the subject of retrospective statutes in general, see the note to *Goshen v. Stonington*, 10 Am. Dec. 131.

KITTREDGE v. WOODS.

[3 NEW HAMPSHIRE, 503.]

MANURE LYING ABOUT A BARN passes to a grantee of the land as an incident thereof, unless reserved in the deed.

TRESPASS for breaking and entering the plaintiff's close and carrying away forty loads of manure. Plea, the general issue, and also a license. It appeared that in 1823, the plaintiff was a tenant of the farm where the manure was made by cattle about the barn, and that he contracted with the owners to use the hay on the farm. In 1824, the plaintiff purchased one half the farm and the defendant the other half, and they held it in common until April 6, 1824, when they agreed to a division, and the defendant conveyed to the plaintiff all his interest in that part of the farm where the manure was. The defendant afterwards entered and took one half of the manure. The court instructed the jury that the defendant's interest in the manure passed with the land unless it was otherwise agreed. Verdict for the plaintiff, and motion for a new trial on the ground of misdirection.

C. H. Atherton, for the plaintiff.

E. Parker, for the defendant.

By Court, RICHARDSON, C. J. The question, what are to be considered as fixtures, or appurtenances to land, so as to go with the inheritance, may arise between parties standing in very different relations to each other; and there are various classes of cases founded on those various relations, to the decision of which, rules in some degree different have been applied. The parties in this case may be considered as standing in the relation of vendor and vendee, each having sold and conveyed to the

other his interest in a portion of land. As they had an opportunity to adjust every thing by contract, with respect to the division of the land, it will be doing them no injustice so to consider them; and we are not aware, that they can be viewed as standing in any relation to each other in the transaction. The question then, in this cause is, whether, when the land is sold and conveyed, without any reservation, manure lying upon it goes to the vendee with the land? As we find no adjudged case, in which this question has been directly settled, we shall, in order to avail ourselves of the light, which decisions in analogous cases afford, take a broader view of the subject, than the relation between the vendor and vendee presents.

One of the most common cases, where a question of this kind may arise, is between executors, or administrator on the one part, and heirs at law on the other. It is said in the English books, that the line is in this instance drawn more strictly there, than in any other: 7 Taunt. 191; 3 East, 88. And it seems to have been settled, that in general whatever has been in any way annexed to the freehold, for the benefit of the inheritance, and is necessary to its enjoyment, shall go to the heir. Thus, in *Lawton v. Salmon*, 1 H. Bl. 259, note, it was decided, that salt pans used in the manufacture of salt, although they might be removed without injury to the building, should go to the heir. So pictures and glasses are in general personal estate; but if put instead of wainscot, they go to the heir: 1 Eq. Ca. Ab. 275; *Beck v. Rebow*, 1 P. Wms. 94. Thus, also, posts fixed, mill stones, anvils and doors go to the heir: Wentworth, 62; Godolphin, 127. Grass ready to be cut down, and fruit upon trees, belong to the heir; but the executor is entitled to all crops of grain, annually sown: Wentworth, 59; Godolphin, 126; Perkins, sec. 514; Com. Dig., "Biens," G., 1 and 2.

Many things which are not affixed to the freehold, go to the heir, as appurtenances to the inheritances. Thus it is said, that young doves in a dove-house, not able to fly, belong to the executor. But the old doves go with the dove-house to the heir: Wentworth, 57; Godolphin, 126. So keys of doors go to the heir: Wentworth, 62; and chests containing the title deeds of the inheritance: Wentworth, 64. And we are inclined to think that the principles of these decisions will give to the heir the manure which may have been carried and left upon the fields in heaps for dressing, or which may be left lying in heaps about barns upon the land.

Another class of cases where the question, what shall or shall

not go with the inheritance, arises, is between the representatives of the tenants for life and remainder-men. Here a considerable relaxation of the strict rules, which have been applied between executors and heirs, has taken place, on principles of public convenience, to encourage tenants for life to lay out money in improving the estate. And, as the termination of the particular estate is, in these cases, uncertain, the maxim, that he who sows, shall reap, is applied; and it is held that, if the tenant for life sow the land, and die before the corn is reaped, his executor shall have the crop: *Nay's Maxims*, 51. But grass, ready to cut down, and fruit upon trees, go with the inheritance: *Wentworth*, 59. Hops, however, growing out of ancient roots, go to the executor of the tenant for life: *Latham v. Atwood*, Cro. Car. 515.

The same question may arise between lessors and lessees. Here, the general rule is, that whatever is fixed to the freehold becomes a part of it; and it is waste to remove fixtures: *Bull. N. P.* 34; 3 *East*, 51; *Co. Lit.* 53, a; *Moor*, 179. But things annexed to the freehold for the purpose of carrying on a trade, or manufactures, form an exception to the rule, and may be removed during the term: *Poole's case*, 1 *Salk.* 368; *Penton v. Robert*, 2 *East*, 88; *Dean v. Allalley*, 3 *Esp. N. P. C.* 11; 4 *Taunt.* 316; 8 *Mass.* 416.

A tenant in agriculture cannot, however, even during his term, remove buildings by him erected, and annexed to the freehold: *Elves v. Maw*, 3 *East*, 38. Some things, although originally goods and chattels, cease to be so by being affixed to the freehold; and in many cases, although the tenant may, during the term, remove things which have been affixed to the freehold, yet he cannot do it afterwards, but they become a gift in law to him in the reversion: 7 *Taunt.* 190; 1 *Salk.* 368; *Fitz Herbert v. Shaw*, 1 *H. Bl.* 258; 20 *H. VII.* 13 a and b. Timber trees, if blown down, or cut down by a stranger, although severed from the land, belong to the lessor: *Co. Lit.* 220 a; *Berry v. Heard*, Cro. Car. 242; 11 *Coke*, 84; 3 *P. Wms.* 267; *Page's case*, 5 *Coke*, 77; *Herlackenden's case*, 4 *Id.* 62; *Com. Dig.*, "Biens" H. Matters of ornament, as marble chimney pieces, pier glasses, hangings and wainscot, fixed with screws, may be removed by the tenant: *Beek v. Rebaw*, 1 *P. Wms.* 94. With respect to manure made by cattle in barns, nothing seems ever to have been decided. The question will generally depend upon the contract between the lessor and lessee. Where there is no contract, decisions in analogous cases may

perhaps induce courts to hold that the lessee may, during the term, dispose of the manure as he pleases; but that if no disposition be thus made of it, it will belong to the lessor. Whenever this question has arisen between the vendor and vendee of land; there seems to have been no relaxation from the rigid rules, which were anciently established, except perhaps in the case of *Gale v. Ward*, 14 Mass. 352 [7 Am. Dec. 223], the law of which is very questionable on more than one ground: *Far-rant v. Thompson*, 5 B. & A. 826. It is well settled that when land is sold and conveyed without any reservation, whatever crop is upon the land passes: *Wentworth*, 59. And mill stones, although they may be out of the mill at the time, for the purpose of being prepared for use, pass by a sale of the mill: 11 Coke, 50. And we think it cannot admit a doubt that trees felled, and left upon the land, fruit upon trees, or fallen and left under the trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation. And the law is the same with respect to manure carried and left in heaps upon the land for the purpose of dressing it. And we are of opinion that all manure, whether it be in heaps about barns, or made in other places upon the land, goes with the land to the vendee. A crop of wheat ready to be reaped, or of corn ready to be gathered, are considered as chattels, and may be seized and sold as such upon execution: *Whipple v. Foot*, 2 Johns. 418 [3 Am. Dec. 442]; *Hodgson v. Gascoigne*, 5 B. & A. 88; 17 Johns. 128. And under a decision of all goods, chattels, and movables, growing corn will pass: *Cox v. Godsalve*, 6 East, 604. And it seems that *indebitatus assumpsit* for a crop of corn sold standing in the field may be maintained: *Poultter v. Killingbeck*, 1 Bos. & P. 397; although the price of fixtures cannot be recovered in an action for goods sold and delivered: *Lee v. Riden*, 7 Taunt. 188. But, notwithstanding ripe grain in the field has been always thus considered as a chattel, yet no doubt seems to have been entertained that it passed with the land, when sold without any reservation. If ripe corn standing upon the land will pass with the land, it will be difficult, it is apprehended, to find any principle upon which manure lying upon the land can be held not to pass: *Colegrove v. Dios Santos*, 2 Barn. & Cress. 76.

We are, therefore, of opinion that the direction to the jury was correct, and there must be judgment on the verdict.

MANURE AS A FIXTURE.—The doctrine of the principal case is in harmony with the generally accepted rule regarding the rights of the vendee and

lessor to the manure upon agricultural lands. A distinction is sometimes made between the cases of manure piled in heaps about a barn, and those where the manure is scattered over the farm, and is difficult of separation from the soil. In the former case the manure has been in some instances regarded as personal property, removal by the tenant, or remaining in the grantor and passing to the executor, while, in the latter case, the manure savors of the realty: 1 Williams on Ex. 511. But the principles governing in determining the nature of the property in this product of the farm, do not turn upon its *locus*, but upon that which is for the best agricultural interests. In the case of landlord and tenant, the question arose in *Lewis v. Jones*, 17 Pa. St. 262, 264, and *Lewis, J.*, speaking for the court, for whose consideration the correctness of the instructions to the jury on the trial below was brought, said: "The court instructed the jury that if they believed 'that the defendant was the tenant of the plaintiff, and rented the land of him for farming purposes, and the manure was made upon the land in the ordinary course of farming and was heaped up in the yard, and the defendant, about the time his lease was to expire, took the manure now the subject of controversy, and hauled it away without the consent of the plaintiff, when there was no authority given by the lease for him to do so, this action can be sustained, and the plaintiff will be entitled to recover the value of the manure that was in this manner removed and carried away.' It is implied from the letting of a farm for agricultural purposes, that the tenant will cultivate the land according to the rules of good husbandry. This is as much a part of the contract as that he shall deliver up possession at the end of the term, or that he shall do no waste." It is the desire to advance the productive quality of the soil, in the interests of agriculture, that have induced the courts, almost uniformly, to lay down the rule in substance as stated by Tyler on Fixtures, 356: "The rule of law may therefore be safely declared, that manure made upon a farm, or gathered in therefrom and produced mainly by the feeding and depasturing of sheep, cattle and horses, on its succulent vegetables and grasses, or other products of the farm, in the absence of any stipulation or custom to the contrary, belongs to the farm, and cannot be legally removed therefrom by the tenant. But if the manure were not produced directly or indirectly from the land, and were in no sense the product of agricultural demised premises, such as accumulates in livery stables and the like, it is no part of the realty, and may be removed by the tenant at the close of his term." Supporting this rule are: *Fletcher v. Herring*, 112 Mass. 382, 384; *Strong v. Doyle*, 110 Id. 92, 93; *Gallagher v. Shepley*, 24 Md. 418, 427, 428; *Wing v. Gray*, 36 Vt. 261, 267; *Parsons v. Campbell*, 11 Conn. 525; *Middlebrook v. Cowen*, 15 Wend. 169; *Plummer v. Plummer*, 30 N. H. 558; *Perry v. Carr*, 44 Id. 118; *Proctor v. Gilson*, 49 Id. 65.

The exception to the rule mentioned by Tyler, that where the manure is not made in the course of husbandry, as in livery stables, it is personalty, is also recognized by the adjudged cases: *Proctor v. Gilson*, 49 N. H. 62; *Lassell v. Reed*, 6 Mo. 222; *Daniels v. Pond*, 21 Pick. 367.

The doctrine of the above cases, extracted from decisions arising on disputes between landlords and their tenants, is also applicable to the relation of vendor and vendee. In general, the rule regarding fixtures is relaxed if anything in favor of tenants, and where, in their case, a specified article is held to go with the realty, the reason of such rule will apply with full force to that of vendee. And by deeds of conveyance the manure is held to pass to the grantee with the farm, in the absence of stipulations or customs to the contrary: *Ewell on Fixtures*, 305.

Notwithstanding the great preponderance of authority establishes the rule as above laid down, yet, in New Jersey, in *Ruckman v. Outwater*, 28 N. J. L. (4 Dutch.) 581, it is held that where land is conveyed by deed, without any clause of reservation, the title to the manure lying in and around the barn-yard does not pass to the grantee; and the distinction adverted to previously is recognized, viz., that manure lying in a barn-yard, where it has accumulated, is personal property, but after it is spread upon the land, and appropriated to fertilising purposes, it becomes a part of the freehold and passes with it. This decision, however, is denied in *Ewell on Fixtures*, 305, and is examined at full length in *Tyler on Fixtures*, 351, 353, where it is dismissed with the following criticism: "But this is all contrary to the general rule in respect to strictly agricultural lands, and in the absence of special circumstances, customs or stipulation can hardly be regarded as the correct doctrine." North Carolina also has adopted the exceptional rule, that a tenant who is about to move, may, where there is no covenant or custom to the contrary, take with him all the manure made on the farm by him; and, in harmony with the law of fixtures between landlord and tenant, has held further, that if the tenant leaves the manure, it belongs to the owner of the land: *Smithwick v. Ellison*, 1 Ired. 326; *Sandere v. Ellington*, 77 N. C. 255.

FIXTURES BETWEEN LANDLORD AND TENANT.—See *Holmes v. Tremser*, 11 Am. Dec. 238, and note.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

SWAYZE v. HULL.

[3 HALSTED, 64.]

ELECTION, CONTRACT FOR SERVICES AT.—A note given in consideration that the payee will give the maker his interest in an ensuing election for sheriff, is void.

CERTIORARI to reverse the judgment of a justice, in favor of Hull, the plaintiff below, in an action on a promissory note, for fifty dollars, conditioned upon Swayze's getting the office of sheriff, for which he was a candidate at an election then pending. The plaintiff averred that Swayze did get the office, and that all the conditions of the note had been complied with.

Wall, for the plaintiff in the *certiorari*, contended that the judgment ought to be reversed, because the plaintiff's demand in the court below exhibited no legal cause of action; that the agreement set forth, was a corrupt bargain to secure the interest of the plaintiff below, in the election for sheriff; that such agreements were in direct violation of sound policy, and, therefore, void by the principles of the common law, and that to countenance them in a court of justice, would be to destroy the purity of our elections.

By COURT. There is no doubt it is a corrupt and void agreement. Therefore, take a reversal.

Judgment reversed.

WAGERING ON THE RESULT OF AN ELECTION.—See note to *Bunn v. Riker*, 4 Am. Dec. 299.

Contracts which tend to the corrupting of an election, are universally deemed contrary to public policy, and void: 13 Am. Law Reg. N. S. 607. 610

In pursuance of this general rule, a note given in consideration of the payee's agreement to resign a public office in favor of the maker, and to use his influence in favor of the latter's appointment, as his successor, is void in the hands of the payee: *Meacham v. Dow*, 32 Vt. 721. And an agreement between two voters to "pair off," and both to abstain from voting, is void: *McCrary on Elections*, sec. 193. In *Nichols v. Mudgett*, 32 Vt. 546, it appeared that the defendant was indebted to the plaintiff, and being opposed to him as candidate for town representative, it was agreed between them that, if the defendant would use his influence for the plaintiff's election, and do what he could for that purpose, that, in case of the plaintiff's election, the indebtedness should be considered discharged. Nothing was specifically said about the defendant's voting for the plaintiff, but he did so, as he would not have done but for the agreement. The plaintiff was elected and then brought this action upon the indebtedness. The agreement was held to be no defense. In the course of the opinion, Judge Aldis used the following forcible language: "The bargain was not only the sale of the defendant's vote but also of his influence and exertions against his convictions and opinions. The defendant generally voted for the candidate of the other party and but for this agreement would not have voted for the plaintiff nor favored his election. This also was immoral and against public policy. Every voter is bound to use his influence to promote the public good according to his own honest opinions and convictions of duty. If, for money or other personal profit, he agrees to exert his influence, against what he believes to be for the public good, he is corrupt and the agreement void, though in the actual exercise of his influence, against his conscience, he resorts to no unlawful means. Such bargains cannot be enforced in law. And the reason why they cannot be enforced is, not merely because they are made criminal acts by statute, or are opposed to the provisions of the constitution, but because of their own inherent turpitude, because they are corrupt and corrupting, because they are destructive to public virtue and the welfare of the community. In republican governments especially, whatever tends to destroy the purity of elections should be guarded against with the strictest watchfulness, and pursued with the most prompt condemnation, by courts and legislators."

The principles of public policy which forbid and make void contracts rendering elections impure, apply equally to what are called primary or nominating elections or conventions: *McCrary on Elections*, and cases cited.

CAMPBELL v. SMITH.

[3 HALSTED, 140.]

WATER, RIGHT IN.—Property in water, and in the use and enjoyment of it, is as sacred as the right to the soil over which it flows.

PRESCRIPTION AGAINST WATER RIGHTS.—After the lapse of twenty years, during which adverse possession of a water right has been continuously maintained, a grant will be presumed in favor of the adverse holder; but possession for the full period is indispensably necessary to defeat the right of the proprietor of the ancient channel.

PRESUMPTION OF A GRANT OF THE RIGHT TO WATER does not arise from the mere submission of the owner to an adverse enjoyment thereof, for a period less than twenty years.

TRESPASS. The case appears from the opinion of the chief justice. Verdict for the defendants and motion for a new trial.

Attorney-general, for the plaintiff.

Hornblower and Halsey, contra.

EWING, C. J. A stream of water was accustomed for a long series of years, and beyond the memory of the most aged of the vicinage, to flow in a natural channel in the township of Springfield, in the county of Essex. In the year 1800, John Clark built a paper-mill at a short distance from this ancient water-course on a lot of land of which he had become the owner, through which it did not run and to which it did not adjoin. Sometime after the erection of the mill Clark placed, not on his own land, but on the land of John Denman, a dam across the ancient water-course, and dug a ditch whereby he led the water diverted from its channel into a pond on his own land, fed by other streams, on which he mainly relied for his manufacturing operations. In the summer of 1822 the defendants, then the owners of the land through which the stream had in times past flowed, and of course of its ancient bed, built a pasteboard mill, and to aid in the necessary supply of water, in October of that year, prostrated the dam and thereby permitted the water to resume its ancient channel, and deprived the plaintiff, for some time previous become the owner of Clark's mill, of the advantage which he and his predecessors for some years had used and enjoyed.

The plaintiff sought redress by the present action brought to November term, 1822, and tried at the April circuit, 1823, before Justice Rossell, when the jury found a verdict for the defendants after a charge from the judge, in which, having first given a view to the claims of the parties and of the evidence on both sides, he proceeds thus. (Here the chief justice read the charge.) The verdict is impugned by the plaintiff, because, as he alleges, the judge presented the case to the jury in too limited a view, placing it only on the length of time and the nature of Clark's possession, and that he did not, as he ought to have done, inform them that under the circumstances of the case they were warranted to presume against the claim of the defendants. I do not understand the charge precisely as the plaintiff's counsel, and hence I do not consider the judge as having presented so limited a view; for although it is true he told them that relying on time for a presumption of title, there must be twenty years, and those years of adverse possession:

and that in his opinion, submitting the matter as a question of fact to their examination, the possession of Clark was not adverse; and if so, the case did not afford the plaintiff the requisite period, yet he also informed them "that a jury have a right on a possession of less than twenty years, attended with circumstances favorable to a presumption of title to presume it." If then the jury found such circumstances to exist, they were authorized, under this direction, to have presumed a grant and sustained the claim of the plaintiff.

It is true, the judge did not inform the jury that under the circumstances of the case they were warranted to presume against the claim of the defendants; or, in other words, that upon the facts in evidence the law had deprived the defendants of a right which once existed in them or those under whom they claimed to the flow of the water in the ancient channel. On the contrary, the charge was very distinctly the reverse, and yielding fully that the jury ought to have been informed, if such were the law, that the circumstances did warrant them so to presume, the inquiry results whether such circumstances are presented by the case. The use and enjoyment of water flowing in an ancient channel through one's land, and to prevent the diversion and deprivation of it, especially by a person owning no land through which it runs, are rights as certain, recognized and well defined as any within the compass of legal protection. Property in water, and in the use and enjoyment of it, oftentimes as valuable, is as well secured as any other. Among the oldest reports in print will be found an assertion of this right.

In the book called *Liber Assisarum*, 32 Edw. III., fol. 194, Pl. 2, an assize of nuisance was brought, because the defendant had made a trench, and thereby drawn from a river, a part of the water which had been accustomed to run to supply the mill of the plaintiff. It was adjudged that the plaintiff should recover his damages, and that the water should be returned to the ancient channel at the cost of the defendant. A train of subsequent cases has sustained the right: *Luttrel's case*, 4 Co. 86; *Stone v. Bromwich*, Yelv. 166; *Countess of Rutland v. Bawler*, Palm. 290; *Shury v. Piggot*, Bulst. 309; *Sands v. Trefuses*, Cro. Car. 575; *Cox v. Matthews*, 1 Ventr. 237; *Palmer v. Heblethwaite*, Skinner, 65; *Mersey and Irwell Navigation Co. v. Douglass*, 2 East, 502. In *Gardner v. The Trustees of the Village of Newburgh*, 2 Johns. Ch. 165 [7 Am. Dec. 526], Ch. Kent, said: "A right to a stream of water is as sacred as a right to the soil over which it

flows; it is a part of the freehold of which no man can be dis-seised but by law." Our venerable and learned Kinsey, C. J., in the case of *Merril v. Parker*, 1 Coxe, 460, said: "When a man purchases a piece of land, through which a natural water course flows, he has a right to make use of it in its natural state, but not to stop or divert it to the prejudice of another. *Aqua currit et debet currere*, is the language of the law. The water flows in its natural channel and ought always to be permitted to run there, so that all through whose land it pursues its natural course may continue to enjoy the privilege of using it for their own purposes. It cannot legally be diverted from its course without the consent of all who have an interest in it."

This right like other rights of property, like "the right to the soil over which it flows," like "the freehold of which it is a part," like "the land" through which "it pursues its natural course," may be lost by efflux of time. Statutes of limitation, prescribing the time within which an entry shall be made into lands, tenements or hereditaments (Rev. Laws, 411, sec. 9), and within which every real, possessory, ancestral, mixed or other action for any lands, tenements or hereditaments shall be brought (*Id.*, sec. 6), are not deemed to comprehend in terms and within their purview, the right now under consideration; but upon the wise principles of such statutes, and in analogy to them, to quiet men's possession, and to put an end and fix a limit to strife, a rule is established, that after the lapse of the period mentioned in those statutes, a grant will be presumed; not (says Lord Mansfield, *Cowp.* 215; *Eldridge v. Knott*, and others), that in such cases the court really thinks a grant has been made, but they presume the fact for the purpose and from a principle of quieting the possession. The period of twenty years is settled in England, according with the times mentioned in the statute of 21 Jac. 1. Our statute prescribing a like period, our rule is the same, and pursuing the analogy, the possession which should ripen into a right and defeat a title, otherwise valid, must be open, notorious and adverse.

In the case of *Prescott v. Phillips*, 6 East, 283, Adair, chief justice of Chester, ruled that nothing short of twenty years undisturbed possession of water diverted from the natural channel, could give a party an adverse right against those whose lands lie lower down the stream, and to whom it was injurious, and that a possession of above nineteen years, which was shown in that case, was not sufficient. In *Bealey v. Shaw*, 6 East, 208, Lord Ellenborough says: "Independent of any particular en-

joyment used to be had by another, every man has a right to the advantage of a flow of water in his own land without diminution or alteration. But an adverse right may exist founded on the occupation of another; and though the stream be either diminished in quantity or even corrupted in quality as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it, have existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. I take it that twenty years exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it derived from grant or act of parliament." In *Balston v. Benstead*, 1 Campb. 463, Lord Ellenborough recognizes the same rule as to time.

In *Ingraham v. Hutchinson*, 2 Conn. 584, Swift, C. J., says: "By the common law every person owning lands on the banks of rivers has a right to the use of the water in its natural stream, without diminution or alteration; that is, he has a right that it should flow *ubi currere solebat*, and if any person on the river above him interrupts or diverts the course of the water to his prejudice, an action will lie. But a special right different from the general one may be acquired by an adjoining proprietor by grant, or by such length of time as will furnish presumptive evidence of a grant. In England it has been decided that twenty years exclusive enjoyment of water in a particular manner affords a conclusive presumption of right in the party enjoying it, derived from some individual having the power to make it, or the legislature; and in this state fifteen years exclusive enjoyment will furnish the same evidence." Gould, justice, says, if the defendant had diverted the stream from the plaintiff's land, or if the plaintiff had, by obstruction cast it back, and overflowed the land of the defendant, and the injury had been acquiesced in for fifteen years on either side, a grant might now be presumed in favor of the one or the other of the parties. In *Sherwood v. Burr*, 4 Day 244 [4 Am. Dec. 211], Mitchell, C. J., says: "In analogy to the statute of limitations which gives title to land by fifteen years adverse possession, the plaintiff must be considered as having acquired a right to use and improve the stream of water in the manner it has been improved for thirty or forty years. If necessary to support the plaintiff's title to the privilege, the law would presume a grant even from the defendants, or those under whom they held. Twenty years undisputed possession of any easement appur-

tenant to land is sufficient in England to raise the presumption of a grant. The defendants claim the use of this right for ten years only to have been in them. If fifteen years exclusive adverse possession is the least term of time which can give title to freehold estate, surely as long quiet enjoyment will be required to create a title of the nature in question.

In the case of *Vooght v. Winch*, 2 B. & A. 662, the judge had charged the jury that in the case of all streams of water, the use of which furnished beneficial enjoyment to any individual, the material thing to be attended to was what had been the actual possession and enjoyment by such person for the last twenty years; and that if water had been in fact enjoyed during that period to a certain extent of supply, or at a certain level, no private person was at liberty to do any act which altered that state and condition for the purpose of improving his own estate, and that the rule applied equally to all streams, whether navigable or not. The court of K. B. held that the rule did not apply to navigable rivers, and in this respect the direction of the judge was erroneous, but did not in the slightest degree call in question the application of the rule to private innavigable streams either as to principle or time. In *Chalker and others v. Dickinson and others*, 1 Conn. 382 [6 Am. Dec. 250], Swift, C. J., delivering the opinion of the court, says: "In England, by statute 21 Jac. I., it was enacted that no person that has any right or title of entry shall enter but within twenty years next after his right or title shall accrue. Courts extended the principle of this statute to similar cases within the same reason. A like statute was at an early period enacted in this country, limiting the right of entry to fifteen years, and courts extended the principle to similar cases. Hence it became an established rule of the common law that easements may be acquired by uninterrupted possession for twenty years, such as rights of way, flowing another's land, diverting water-courses, fisheries and the like. But in every case of this description, the use and possession in the first instance are an usurpation of the rights of some other person, and an action would always lie till the fifteen years are elapsed. It is considered that no man would permit another thus to occupy and possess his right without a grant, and in all these cases the law presumes there has been a grant, for the idea is not entertained that a man by being a trespasser for fifteen years can, by the common law, acquire a right. But as the grant depends on a presumption of law, it is always competent to rebut it by proof of such cir-

cumstances as show no grant could have been made. The general rule then is that certain rights may be acquired against individuals by fifteen years uninterrupted possession and use, unanswered and unexplained."

In 3 Cai. 319, Justice Thompson states the presumption from twenty years possession as mentioned by Lord Ellenborough, in the passage already referred to, and calls it an undeniable principle of the common law. Lord Erskine, speaking as chancellor, in 12 Ves. 265, on the doctrine of presumption and the effect of long use, puts on the same ground the use of water and light, and the right of way. Seventy years of uninterrupted and adverse enjoyment of a right of way and of ancient lights is the fixed period from which a grant will be presumed. Without entering here into a minute review of the cases, the position will be found fully supported by Darwin's Upton, 2 Saund. 175 b, note; *Campbell v. Wilson*, 3 East, 294. In *Gayetty v. Bethune*, 14 Mass. 49 [7 Am. Dec. 188], Parker, C. J., speaking on a question of way, says: "No time before the division of the estate among the heirs could be taken into view for the purpose of presuming a grant, because, as has been before observed, there could not have been before that time any adverse possession, the whole being in Bethune or his grantors. And it is adverse possession only upon which a presumption of grant can arise, or a possession claimed or used as a rightful possession. Since that period sufficient time has not elapsed to justify the presumption of a grant from English and wife; no period short of twenty years has been allowed sufficient for this purpose in this country, nor has it been definitively settled that any shorter period will suffice in England."

In the case of *Wright v. Howard*, in February, 1823, Simons and Stuart's Rep. 190, the vice-chancellor of England, Sir John Leach, says: "*Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietor below, nor throw the water back upon the proprietor above. Every proprietor who claims a right either to throw the water back above or to diminish the quantity of water which is to descend below, must, in order to

maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience as affording conclusive presumption of a grant."

There is nothing in the cases read at the bar to impugn this doctrine. *Oswald v. Leigh*, 1 T. R. 270, was debt on a bond, and the defense relied on presumption of payment. No demand had been made for nineteen years and a half; the parties were men of fortune, resided in England, and lived on terms of intimacy, yet the jury found for the plaintiffs, and the verdict was sustained in K. B. Buller said he had always been of opinion that no less than twenty years, of itself, could form a presumption that a bond had been paid. In those cases where satisfaction had been presumed within a less period, some other evidence had been given in favor of such a presumption, such as having settled an account in the intermediate time, without any notice having been taken of such a demand. In the case of *Colael v. Budd*, in 1807, 1 Campb. N. P. 27, very nearly twenty years had elapsed after the bond became payable and before the suit, and the defendant undertook, but failed, to show a settlement of accounts between the parties when a sum of money had been paid sufficient to cover the demand on the bond. Lord Ellenborough said, if it had been proved that the parties had accounted together after the money became payable, it might have been inferred that it was included in the settlement, but as there is no evidence of this, and as twenty years have not elapsed since the bond was forfeited, it cannot be considered as discharged. The cases of *Jackson v. McCall*, 10 Johns. 377 [6 Am. Dec. 343], and *Jackson v. Pratt*, 10 Johns. 381, can have no just influence on the subject before us. The former evinces the general undisputed position that a patent or deed may be presumed. In the latter where a mortgage of forty years old was set up, to put which in force no steps had been taken, nor had any demand under it been made for upwards of nineteen years before the trial, the court held that from the payments which had been made at that time and before, and the silence of any claim under it, the jury would have been warranted to have presumed it satisfied.

The *Winchelsea causes*, 4 Burr. 1962, affords no rule or analogy for the present question. The whole matter was there subject to the discretion of the court; they were about to fix a rule where avowedly no rule existed. Even there, however,

the court say twenty years possession must elapse before they will presume a right in corporators to hold their corporate offices, and before they will refuse to disturb the peaceable possession of a franchise. But they do not say that they will, at any period, or under any circumstances under twenty years, presume such right; they only say, that "within twenty years their granting the rule or refusing to grant it, would depend on the particular circumstances of the case, which should be in question before them." In other words, that the granting the rule to show cause why an information in nature of a *quo warranto* should not be filed, was not a mere matter of course; that after twenty years peaceable possession they would not grant it; nor would they, within that time, unless just circumstances to induce an inquiry should be presented to them. From this review of the cases, and I find none that sustains a contrary doctrine, it is in my opinion clearly shown that, in point of time, twenty years of adverse possession of a diverted water-course are indispensably necessary to defeat the proprietor of the ancient channel and to repel his reclamation of his right. The law in this respect, as laid down to the jury, was unquestionably sound. If the jury found from the evidence that the original diversion of the water had been made within twenty years, and upon this head there was a conflict of testimony, in which to set that of the defendants in the least favorable light, it was not so much overbalanced as to induce or justify us to interfere with the verdict; or if the jury believed that the diversion had been made under the authority and permission of Walter Smith, and with repeated recognition of his right during the time of Clark, and until the sheriff's sale in 1807, and about fifteen years before the commencement of the action, the jury had not a foundation broad enough in point of time on which to raise the superstructure of a grant. By the circumstances of time, then, they were not warranted in presuming against the claim of the defendants.

In the remarks which I have made, it is perceived, I have confined my view to a consideration of time as a circumstance, an independent or disconnected circumstance, on which the presumption of a grant may be raised. In the case of *Bealey v. Shaw*, Lord Ellenborough is reported to have said that less than twenty years enjoyment may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right. This expression unfortunately is vague and defective in precision. If by circumstances are here meant

facts sufficient in themselves to sustain a presumption or rebut and bar a right; or if he meant to say there may be facts from which such a presumption will result, or whereby a right may be rebutted or barred, although twenty years have not passed; as for instance, where a fraudulent concealment or misrepresentation has been made; where a trustee or other person was bound to convey; where a party in possession was entitled to a conveyance under an agreement or trust; where an act ought to have been done, which, therefore, in many instances the law will presume done; or something is shown irreconcilable with truth and nature, without the existence of a grant; the position is correct, and here these circumstances, not the time, are the basis of the presumption, or of the bar. If by circumstances anything else be meant, the position is unsupported by analogy, adverse to the steady current of authorities and repugnant to the opinion of the same eminent judge in the subsequent case of *Den v. Wilson*, 11 East, 56, which will be hereafter noticed.

Admitting, then, that such circumstances may exist, let us look into the evidence in the case before us and see if there be such here; if there be circumstances which in point of law would have warranted the jury in presuming against the claim of the defendants, and should consequently have called for such direction to them from the court. The whole benefit of the rule which enables the court to regard with a more favorable eye the presumption which supports than that which defeats a right, cannot, I think, be yielded to the plaintiff as claimed by his counsel. The plaintiff relies on presumptions, not to support, but to give a right, not to strengthen or sustain an acknowledged right, but to make that right which would otherwise be usurpation. He relies on them, too, to defeat the undisputed right which was once held, and without the claims and right, if such they be, of the plaintiff, would still be held to the flow of the water along its ancient and natural bed. The facts urged by the plaintiff are, the submission of Walter Smith and the present defendants to the diversion of the water from its ancient channel; in other words, to the possession of their property by others; the silence of Smith when the mill was purchased from the sheriff by Laing in 1807, and when it passed by purchase and sale through other hands; and the acquiescence by Walter Smith in the use of the diverted stream by Breath after he refused to pay rent for the new pond.

The submission of the owners of the ancient channel to the diversion of the water can avail the plaintiff nothing. No

instance exists in which the possession of real property, with the knowledge and without a murmur of the owner, has been held short of the period of limitations to destroy his right. The law has yielded him twenty years, and told him his right shall, for that period, retain its full vigor, and may be asserted with equal force in the last hour as in the first. Short of that period, then, a mere submission cannot, by presumption, deprive the owner of his property. Of this opinion were the court of K. B., in the case of *Den v. Wilson*, and Lord Ellenborough must have considered this sort of acquiescence as not one of the circumstances alluded to by him. In the case of *Bealey v. Shaw*, ejectment was brought by the lord of the manor to recover a copyhold estate, and a small parcel of the waste land of the manor, which had been inclosed by the defendant. The inclosure, which was small, appeared to have been taken from the waste land, about twelve or thirteen years before by the defendant, and annexed to some other land belonging to him; but the lord's steward was proved to have seen this inclosure from time to time after it was made (the same lord and steward continuing all the time), and no evidence of any objection made. Lord Ellenborough and the court held that the continual view of the steward, acting under the same lord for that period without any objection, might be sufficient for the jury to presume a license, and hence refused to consider the defendant as a trespasser, which license, however, the lord might countermand, and then recover possession, but that a grant from the lord would not be presumed within twelve or thirteen years.

The silence of Walter Smith and his omission to notify Laing Wooley and Breath of his right. It is not clear from the evidence that the water flowed exclusively in the diverted channel at the sheriff's sale. For two months previous, Clark's paper-mill had not been wrought, and one of the witnesses (William Smith) says, at the time, the little stream ran some into the new pond, and some to the ditch leading to the plaintiff's pond. No evidence is given that Walter Smith was present at either of the sales, or at any treaty or negotiation leading to them, or that he knew of them until after they had occurred, or that he was in the slightest degree consulted respecting them; and as to the expenditures of money on the property, nothing is shown after the erection of the mill by Clark, except in the article of purchase, unless it be in some inconsiderable repairs, of which Smith may well have known nothing. Under such circumstances, no case, even in a court of equity, has, it is

believed, presumed against or defeated the right of the owner. In *Slaver v. Barker*, 6 Johns. Ch. 168, Ch. Kent states the ruling equity to be, "That where one having title acquiesces knowingly and freely in the disposition of his property for a valuable consideration, by a person pretending to title and having a color of title, he shall be bound by that disposition of the property, and especially if he encourages the parties to deal with each other in such sale and purchase." In *Brinkerhoff v. Lansing*, 4 Johns. Ch. 70 [8 Am. Dec. 538], he lays down the rule with respect to incumbrances to be, that if a prior incumbrancer be a witness to a subsequent conveyance or incumbrance, and knowing its contents, does not disclose the fact of his own incumbrance, but intentionally suffers the party dealing with his debtor to remain in ignorance, he shall have his incumbrance postponed or barred, because he is thereby auxiliary to an act of fraud; and even this rule, he holds, does not extend to cases of prior registered mortgages. "The mere silence of a mortgagor, when he is present at the execution of a subsequent purchase or incumbrance, is not sufficient to affect his right, unless that silence was intentional and for the purpose of deception. The inference is not to be drawn from silence alone, under the operation of our registered act. There must be active fraud charged and proved, such as false representations, or denial upon inquiry, or artful assurances of good title, or deceptive silence when information is asked. The burden of the charge, and of the proof, lies upon the purchaser. He must make out the fraud, and the mortgagee is to be presumed innocent until proved to be guilty."

In the case of *Holmes v. Custance*, 12 Ves. 279, legacies were given of one hundred dollars apiece to the children of Robert Holmes. Under an impression from strong circumstances that the testator had meant George Holmes, and by mistake inserted Robert, the executor paid one of the legacies to a trustee of one of the children of George, and took his receipt, to which the plaintiff, one of the children of Robert, was a subscribing witness, who afterwards filed a bill for the legacy. The master of the rolls sustained the claim. "I have some doubt," says he, "as to the effect of the paper that is produced. The way in which that struck me, is as a fraud on the other party if the payment was made on the admission of the plaintiff that he was not the person. Their payment, or resolution to pay, did not originate in any communication with him; but they exercised their own judgment, and then it comes to this, only that the

plaintiff did not resist. There must be either something of a mistake or a fraud by him, in not setting up his claim. Clearly this does not amount to a release by him, nor any fraud in him. It does not appear that he represented that his father was not the person intended. They took it upon themselves, and he acquiesced. There is not enough, therefore, to bar the claim." With what semblance of propriety can the purchaser complain, who, seeing water diverted from its ancient course, flowing along an artificial channel (if such were the case), by a dam, erected not on the land of Clark, made no inquiry whether such diversion were rightful, and by grant and authority from the owners of the ancient bed?

The omission of Smith to resume the water when Breath declined to pay rent for the new pond, is not a circumstance which will legally warrant the presumption required by the plaintiff. It may well be accounted for on obvious and natural grounds. The flow of the water in its ancient course could have produced no advantage or convenience to him. He had declared the water might be diverted to Clark's mill until he or his heirs should erect a mill and need it, and he may not have felt at liberty to gainsay his word. Aside, however, from these considerations, there is nothing in the fact. In legal effect it is no stronger than the silence already considered. It is no act done acknowledging the right of Breath to divert the water. It is no omission by Smith of an act, when an act was indispensable to the support and protection of his right. In the case of *Eldridge Knott and others*, in 1773, Cowp. 214, the trespass complained of was for taking a distress for quit rents due to the lord in right of a manor. The rents had been regularly paid until 1736. In that year the lord had sued the tenant for cutting two trees growing on the tenement, and a verdict was rendered for the tenant, after which the owner of the tenement had refused to pay this quit rent or attend the manor court. In 1738, a demand of the rent was made and refused, after which no further demand or payment had been made. On these facts Baron Eyre was of opinion that though the claim was not barred by the statute of limitations, yet that a non-payment and acquiescent for thirty-seven years was a sufficient ground to presume a release or extinguishment of the quit rents, and left it to the jury to say whether upon the evidence they would or would not presume they were released or extinguished, and the jury found they were. But Lord Mansfield and the court of king's bench set aside the verdict; and although holding there

were many cases where from a principle of quieting possession, the court had thought a jury should presume any thing to support a length of possession, yet this case, they said, stood without a pretense for supposing a release or extinguishment; that the demand, refusal, acquiescence and omission to enforce payment, were in fact nothing; that the case stood on mere length of time, which was insufficient within the period fixed by the statute.

On the whole, I am of opinion, the case was fairly put by the judge to the jury; the verdict is not against the evidence, and ought, therefore, to be sustained.

ROSSELL, J. The counsel for the plaintiff relies, to support his motion for a new trial, on Phil. Ev. Presumption, 118, 119, 121; Cowp. 132; 1 T. R. 272; 4 Burr. 1962; 4 Johns. 377, 380, 381, 387. In the pages cited from Phillips, it is laid down: "There are many cases not within the statute of limitations where courts of justice, from a principle of quieting possessions, have held that juries ought to presume the most solemn instruments to support a long uninterrupted possession; all shall be presumed to have been solemnly done, rather than ancient grants should be called in question." Again, "The presumption of a deed from long usage is for the furtherance of justice, and for the sake of peace." So in the case of a bond which has laid dormant for twenty years. "Forbearance for so long a time unexplained is a circumstance from which a jury may, and ought, to infer that the bond has been satisfied;" and adds the same authority: "It has been sometimes said that payment may be presumed even within that time, citing Cowper, 109. But this is to be understood with reference to those cases only when there has been some other evidence to raise such presumption; or the presumption may be answered by proof of other circumstances, explaining why an earlier demand was not made." In 118, he adds: "Although it may be presumed that a bond has been satisfied after twenty years unexplained, yet it has been held that in the case of a quit rent claimed by the lord of a manor, proof by the tenant that no demand had been made on him for near forty years, was not sufficient to presume a release, for in this case a deed would be necessary, and it would be too much to presume a deed from the mere fact that the quit rent was not demanded." So in 121: "Adverse possession for a shorter period than twenty years will not afford ground for such presumption, and there ought to be some other evidence in support of the right. A license may be proved

within that time (under circumstances), though in general a grant cannot." In 121, the authority continues: "In the cases that have been mentioned, the usage for twenty years was considered as strong presumptive evidence of a grant or agreement; but it is only presumptive, and it may be shown that the usage was limited, modified, bad in its commencement, or originated in a mistake."

1 T. R. 107, was an action on a bond, on which no demand had been made for nineteen years and a half, and a verdict for the plaintiff. Defendant applied for a new trial. The court inclining to believe the truth of the case was with the defendant, desired him to make an affidavit, which, on being read, and not appearing satisfactory, they discharged the rule, and would not permit it to go to a jury. Same book, 272, it is said, if a bond has lain dormant for twenty years, it shall be presumed paid. The presumption of payment on a bond, in a less time than twenty years, must depend on some evidence, or length of time less than twenty years would not be sufficient. Cowp. 102, 8, 9, the marginal note says: "A grant or charter from the crown, which ought to be a matter of record, may, under circumstances, be presumed though within the time of legal memory." In this case the presumption was founded on a possession of three hundred and fifty years. Lord Mansfield says that all evidence is according to the subject-matter to which it is applied.

There is a great difference between length of time which operates as a bar, and by which a jury is concluded, and that which is only used by way of evidence. There is no statute of limitation that bars an action on a bond: but there is a time when a jury may presume a debt discharged, as where no interest appears to have been paid for sixteen years. But if a witness is produced to prove the contrary, by showing the party was not in circumstances to pay, or had acknowledged the debt, the jury must say the contrary. 10 Johns. 377, (so much relied on by the counsel for the plaintiff on the argument), does not in the least degree impugn the doctrine laid down in the foregoing authorities, but is in perfect accordance with them, and cannot give, as I understand it, a shadow of support to the motion for a new trial. This was an action of ejectment brought on the demise of John McDonald, to recover part of two hundred acres of land, confessedly in the possession of McCall, the defendant. The cause was tried before Justice Yates, and a verdict given for the defendant. On a rule to show cause why a new trial

should not be had, the case came before the supreme court, by which it appeared the plaintiff claimed the premises by virtue of an act passed for the relief of D. McDonald, by which all the right of the state was vested in him to two hundred acres of land, allotted by the council to one John Provost in the year 1764, after the same had been surveyed by him by order of the then existing government; which order and survey, referred to in the act, were produced in court and sworn to by a witness as containing the premises in question.

Several witnesses on the part of the defendant, testified that the line now contended for, had been known by them for forty-one years, that John McDonald, father to the lessor, occupied, claimed and held to that line, and made a division-fence there; that the land was surveyed for the king's soldiers, and the said McDonald was with the surveyors; that he had told witness so in 1776; that John McDonald died about eighteen years ago in possession, had built a part of the line-fence, and his son John, the lessor, then came into possession and had built a stone wall on same line. The supreme court held that the confessions of McDonald, the father, were conclusive on his son, the lessor, and the jury might presume an ancient deed to him, and as the occupants on both sides had held to this line for forty-one years previous to the trial, and especially the ancestor of the plaintiff, and the plaintiff himself by building a stone wall on it had recognized that as the true line, the opinion of the judge at the circuit was correct, and that line ought not to be disturbed.

So in the case of 10 Johns. 387, Chief Justice Kent's opinion. The only part of which has the least bearing on the present case respects an old and outstanding mortgage given in evidence by the defendant. The chief justice says: "The mortgage was not to be received as a subsisting outstanding title; assuming that Williams, by means of the possession of the mortgage, was to be considered as the agent of the mortgagees, yet no steps had been taken to put the mortgage in force, nor had any demand been made for upwards of nineteen years previous to the trial, and from the payments which had been made at that time and before, and the silence of any claim under it, the jury would have been well warranted to have presumed it satisfied. The defendant did not set up any title under it, but he set up a title under Williams; and it has been settled that a stranger not claiming title under a mortgage was

not permitted to set it up to defeat a legal title. The plaintiff is entitled to judgment."

In all the foregoing authorities I confess I cannot glean aught to give support to the present application. The substance of the whole as applicable to the present case is, that grants have been presumed after three hundred and fifty years' quiet enjoyment, deeds after forty years acquiescence of the party and his ancestor; mortgages on which payments had been made more than nineteen years before, and there was no after demand, might be presumed satisfied; usages or franchises would not be disturbed after twenty years enjoyment, and a bond on which no payment had been made for sixteen years, might be presumed paid. But Phillips, after citing most of those cases, adds, these are cases of presumptive evidence of a grant or agreement, but only presumptive; and where there was some other evidence to raise such presumption, which may be answered by showing the usage limited, modified, or bad in its commencement. And Lord Mansfield, in *Cowp.* 214, in the case of *Eldridge v. Knott*, and a verdict for plaintiff, says: "There is no instance of setting up time within that limited by the statute as a bar; mere length of time ought not to be so received, and in this case there is no pretense for supposing a release or extinguishment, and it ought not to have been left to a presumption of law within a less time than the period fixed by the statute." And Aston, justice, added: "Here the presumption was to defeat the lord, and mere length of time, unaccompanied with other circumstances, is not sufficient." In these opinions the whole court concurred, and a new trial was ordered. The case is in principle similar to the one before us. The person in possession prosecuted the lord for a trespass and relied on time only, twenty-seven years without demand, to support him. The judge left it to the jury to presume or not a release or extinguishment of the quit rent, and no verdict found for the plaintiff, a new trial was ordered.

So in this case the right was acknowledged to be originally in the Smiths, who, it was abundantly proved, permitted Clark to enjoy the privilege for a time, and who had repeatedly during his life so declared it. To deprive the defendants of this right attached to and sacred as their freehold, the plaintiff relied only on about fifteen years possession, without a particle of other evidence on which to found the presumption he claims. It was in proof that this mill had been at different times idle and neglected; had repeatedly changed owners; that the execu-

tors of a late owner resided in New York, and had sold the premises to Campbell; but it was not even pretended that the defendants were ever privy to or made acquainted with the terms of the sale, or indeed any of the sales themselves, unless Clark's, which was a public one. And the purchaser, from a well-known rule, was bound to examine the whole title. And the other purchasers had probably done so, for we do not hear a whisper of a right to this water from any of them.

I have examined the whole of this case, and the authorities relied on by the counsel for the plaintiff, anxious that if in the haste of a trial at circuit he had been deprived of a single right, it should be restored to him. But the most diligent research has only served to strengthen my opinion of the correctness of the whole of the proceedings, and I am of opinion that the plaintiff take nothing by his motion.

FORD, J., concurred.

Judgment for the defendants.

COXE v. STATE BANK AT TRENTON.

[3 HALSTED, 172.]

JUDGMENT—HOW PAYABLE.—A judgment can not be paid in bank notes, although the bank issuing the notes is the holder of the judgment.

SETTING OFF JUDGMENTS.—The judgment of a justice may be set off against a judgment of a court of record, if the time for appeal has expired.

MOTION to permit the defendant, Coxe, to pay certain notes issued by the plaintiffs, and held by him in satisfaction of a judgment recovered by them against him, and to set off against such judgment the judgments recovered on these notes by Coxe before a justice.

Saxton, in support of the motion to set off the judgments, cited 2 W. Bl. 869; 3 Wils. 396; 2 H. Bl. 253; 2 Bos. & P. 28; 4 Id. 22; 4 T. R. 123; 6 Id. 456; 8 Id. 69.

By Court, FORD, J. As to the first application to bring these notes into court, and to have satisfaction entered, we are of opinion that the notes of the bank are not cash; they cannot be tendered as cash, nor can they be brought into court as such.

As to the second application, the allowing the judgments to be set off. The great question here, to bring this case within the range of the decisions cited, is, whether the demand of the party making the application is admitted. If the plaintiffs do

not admit the demand of the defendant, and mean to appeal from the judgments obtained against them, time should be allowed for that purpose. The court, therefore, suspend the decision of the second point for the present.

At the subsequent November term, it having been stated to the court and admitted by the attorney for the bank, that no appeals had been prosecuted upon the judgments obtained by the defendant, the court ordered the offsets to be made, and referred it to the clerk of the court to make the calculation, and the question of costs was reserved until the next term.

The chief justice, being of the stockholders of the bank, gave no opinion.

SMITH v. MILLER.

[3 HALSTED, 176.]

JUDGMENT—FORM OF.—A judgment entered in figures or for "legal costs" without specifying the amount, is erroneous, and will be reversed.

CERTIORARI to reverse a judgment on the ground that it had been irregularly and illegally entered by the justice in the docket. It was entered: "I therefore give judgment against the defendant in favor of the plaintiff for eighty dollars debt with legal costs, \$4.37."

Sloan, for the defendant in the *certiorari*.

By COURT. The entry of a judgment for "legal costs," without specifying the amount, has been adjudged erroneous, and cause of reversal; so has an entry, in figures, of the judgment for costs. It was also adjudged, before the act of February, 1812, that the judgment is an entirety, so that if erroneous as to costs it must be reversed in the whole, and cannot be reversed as to the costs, and affirmed as to the debt: *Hay v. Imlay*, Pen. 883. The exception now taken is, therefore, fatal to the present judgment unless the case is within the section relied on. But it is manifest that section extends only to errors or mistakes which this court can correct, such as the cases which have frequently been before this court, of judgments for items of costs which ought not to have been allowed, and judgments including the costs of both parties. Where, however, the judgment ascertained no specific amount of costs or is entered in figures, this court cannot reach and correct the error in the form of the judgment or in the entry on the docket.

Judgment reversed.

WOOLLEY v. SERGEANT.

[3 HALSTED, 262.]

NEGOTIABLE INSTRUMENT, WHAT IS.—A request in writing by A. directed to C., requesting him to credit B. or bearer thirty dollars, and promising to pay that sum if the credit should be given, is not a negotiable note, nor a bill of exchange.

THE GUARANTOR OF A NON-NEGOTIABLE instrument is liable without demand or notice.

CERTIORARI. Action by Woolley against Sergeant on his indorsement as follows: "I guarantee the within, twenty-seventh March, 1822, John Woolley," on the following instrument: "Mr. David Sergeant, please to credit John Woolley, or bearer, thirty dollars, and I will pay you by the tenth day of April next, and you will oblige your friend. John Miller. March 24, 1822." This instrument was accepted by Sergeant. The justice rendered judgment for the plaintiff, Woolley, for the full amount of his demand, which judgment was reversed on appeal to the common pleas. To reverse the judgment of this latter court, this writ was taken. The facts are further stated in the opinion.

J. W. Miller, for the plaintiff.

H. Ford, contra.

By Court, **FORD, J.** This case which originated in the court for small causes, went into the common pleas by appeal, and into this court by certiorari, presents a question touching the legal responsibilities of a guarantee under the following circumstances: One Miller drew a request upon Sergeant to credit thirty dollars on book account to Woolley; he, Miller, promising to pay the money at a certain day; and Woolley himself giving a guaranty of this promise on the back of the instrument. Sergeant never demanded payment of Miller, though the latter lived in good credit several months after the money became payable, before he removed out of the place, leaving it wholly unpaid and lost. The question is, on which party shall the law impose this loss?

In cases of guaranty and suretyship, the law regulates the responsibilities of parties by a general rule; but with its usual sagacity, it provides that general rule with every wise and necessary exception; so that the general rules of law appear open and plain like common highways, while the exceptions resemble drift ways and lanes, by being a little more intricate,

but very useful and commodious in their places. The general rule of suretyship assumes this plain and simple form, that if the principal fails to pay or perform according to his undertaking, the surety must pay or perform in his stead. It is this general rule which governs the responsibility of parties to all covenants, recognizances, bonds, special agreements, and similar undertakings. Thus, if a person give a bond on the borrowing of money, and A., who has no interest in the transaction, join in the bond as security, he renders himself responsible till the money is actually paid. The creditor has nothing whatever to do; it becomes the duty of the surety to see that the principal pays the money: *Wright v. Simpson*, 6 Ves. jun. 734. If the case before us come, therefore, under the general rule, it certainly is the duty of the surety to see that Miller pays the money, or else to pay it for him.

But an inquiry yet remains to be made touching the exception to the general rule, and whether this guaranty may not come under such exception. The mercantile transactions of the country, which are mostly done on short periods of credit, and constitute a great portion of the common mass of business, generally employ in their traffic two kinds of paper, under the names of bills of exchange and negotiable notes, and the law, out of favor to commerce, has made for these mercantile instruments, an exception to the general rule, by making the responsibility of parties thereto conform to the custom of merchants. Under this exception, the parties find their duties very different from those under the general rule, and nearly inverted; for here the surety has nothing to do, while the most punctual diligence is exacted from the creditor; he must make a demand of the debt as soon as it becomes due, and give immediate notice of non-payment to the surety, a neglect of either of which duties will absolve the surety in case of a loss. But this exception, founded on the law-merchant, extends to commercial instruments only, and was never applied to paper not of that character in any instance within my knowledge. Now, a note or bill of exchange never comes within the custom of merchants, unless it be drawn to order or bearer in negotiable form, and for the payment of money; but the instrument giving rise to the present dispute amounts neither to a bill of exchange, under the custom of merchants, nor to a negotiable note under the provisions of the statute, for it does not require Sergeant to pay a cent of money, but only to give credit on a book account, and it confines this request of credit to Woolley himself, so that, in the

nature of things, it does not admit of being indorsed over to another person, nor of entering into circulation like mercantile paper, from hand to hand; nay, it does not remain in the hands even of the person in whose favor it is drawn. In the case of *Philips v. Astling*, 2 Taunt. 206, the guaranty respected a regular bill of exchange; it did also in the three cases from 3 Taunt. 130; 8 East, 242, and 2 Johns. Cas. 507. But in *Merle v. Wells*, 2 Campb. 413, a recovery was obtained against a defendant who had guaranteed the payment of a book debt, without any evidence of a demand on the principal; and a recovery under like circumstances was had in the case of *Mason v. Prichard*, 2 Campb. 436. An effort was formerly made in this court to bring an indorsed obligation within the custom of merchants, but it failed on the ground of not coming within the present custom or the statute: *Garrettsie v. Vanness*, 1 Pen. 20 [2 Am. Dec. 333].

The present guaranty is given upon an instrument in no wise commercial, in no respect negotiable, nor capable of circulation in the general market; and an example of placing such instruments under the regulations provided for commercial paper only, besides perverting the law-merchant to a foreign use, and confounding the general rule and exception together, would spread a net-work of forms over the non-commercial and plain dealings of the country, and catch and entangle the property of those who are not merchants, nor familiar with the numerous rules that govern their peculiar paper. The security stood bound under the general rule in this case, to see to the payment of the money, and therefore the judgment of the common pleas ought to be affirmed.

Judgment affirmed.

LETTERS OF CREDIT ARE NOT NEGOTIABLE INSTRUMENTS.—The rules governing bills of exchange and negotiable promissory notes are always the same, fixed and determinate; while letters of credit are to be construed with reference to the particular and often varying terms in which they may be expressed, the circumstances and intentions of the parties to them, and the usages of the particular trade or business contemplated: *Roman v. Serna*, 40 Tex. 306, 318; *Lawrence v. McCalmont*, 2 How. (U. S.) 449; *Bell v. Bruen*, 1 Id. 169; *Lee v. Dick*, 10 Pet. 482; *Mussey v. Rayner*, 22 Pick. 228; *Smith v. Dunn*, 6 Hill, 543; *Orr v. Union Bank of Scotland*, 1 Macq., H. L. C., 513. The difference between a letter of credit and a bill of exchange is: 1. That the letter is not payable absolutely, but only in the event that the letter-bearer may use it, which is optional with him; 2. Is not necessarily for a certain amount; 3. Is not necessarily addressed to a particular person; and, 4. The letter writer in many cases becomes the principal and only debtor for the advances, and is not, in such cases, at all like the drawer of a

bill; and, 5. He is never, like the drawer of a bill, entitled to immediate notice, if the letter be not complied with. Moreover, the liability of the drawer of a letter is not definite like that of a drawer of a bill, but each particular letter of credit is to be construed according to the particular language of the mandate: 1. Sometimes it is a direct order to advance money to a certain amount to the letter-bearer, and an absolute undertaking to repay it; 2. Sometimes it promises to honor bills drawn for any amount which may be advanced to the letter-bearer; 3. And sometimes it undertakes that the letter-drawer will become surety of the letter-bearer to the extent of the amount advanced or credit given him: *Daniel on Neg. Inst.*, sec. 1794 *et seq.*

WHAT INSTRUMENTS ARE NEGOTIABLE.—The characteristics of negotiability are that the instrument should be payable in money, to order or bearer, unconditionally and at all events, and that it should be for a sum certain: 1 *Daniel on Neg. Inst.*, sec. 27. It is requisite that the promise or request should be for the payment of money only. If the instrument be payable in merchandise: *Rhodes v. Lindley*, Ohio Cond. 465; *Lawrence v. Dougherty*, 5 Yerg. 435; or in work, as in "carpenters' work," *Quinby v. Merritt*, 11 Humph. 439, it is not negotiable. There are many instances where instruments payable in bank bills have been held non-negotiable. For example, a promissory note payable "in the office notes of the Lumberman's Bank:" *Irvine v. Lowry*, 14 Pet. 299; a note payable "in current bank bills:" *Simpson v. Moulden*, 3 Coldw. 429; *Fry v. Rousseau*, 3 McLean, 106; a note payable "in New York funds:" *Hasbrook v. Palmer*, 2 Id. 10; or "in current notes of the state of North Carolina:" *Warren v. Brown*, 64 N. C. 381; or "in current funds of Pittsburgh:" 44 Pa. St. 454; or certificate of deposit payable "in current funds:" *Haddock v. Woods*, 46 Iowa, 433. These decisions proceed upon the ground that the medium of payment was not money. An interesting case in this connection is that last cited, *Haddock v. Woods*, wherein the following statements are made: "It is the settled doctrine of this court that paper payable in 'current funds' is not to be regarded upon its face as negotiable: *Huse v. Hamblin*, 29 Iowa, 501; *Rindskopf Bros. & Co. v. Barrett*, 11 Id. 172. It is equally well settled that in an action upon such paper it is competent to show by parol evidence the peculiar meaning of the term 'current funds,' and that the parties to the paper knew that it meant 'money:' *Pilmer v. The Branch State Bank*, 16 Id. 321; *Huse v. Hamblin*, *supra*. The correctness of the rule is so fully vindicated in the first of these cases, that nothing more need be said in its support. Plaintiff, while admitting that it is competent to prove the meaning of the term 'current funds,' insists the understanding of the parties cannot be shown, except by the instrument itself. It is true that the understanding which the parties had of the contract may not be shown by oral evidence, but it is not true that their understanding of the meaning of terms used therein cannot be shown. Indeed, a party must be presumed or shown to understand the language of his contract before it can be regarded as having his assent. We do not understand the language of the finding to imply that the court found the understanding of the parties as to the conditions of the contract, but as to the meaning of words used therein. It is clearly to the effect that the terms 'current funds' was understood by all parties to the paper to mean money." And the court regarded the instrument negotiable.

On the other hand there are many decisions which hold that instruments payable in "current funds," are not for that reason alone, rendered non-negotiable: *Swelland v. Creigh*, 15 Ohio, 118; *Hunt v. Divine*, 37 Ill. 37;

Frey v. Dudley, 20 La. Ann. 368; *Butler v. Paine*, 8 Minn. 324; *Mitchell v. Hewitt*, 5 Smedes & M. 361. In *Pardee v. Fish*, 60 N. Y. 265, 269, a question arose regarding the negotiability of a certificate of deposit payable to order "in current bank notes," and the court held that current bank notes were "notes or bills used in general circulation as money and constituted the general currency of the country recognized by law at the time and place where the payment was to be made and demanded. These notes which were in circulation when the certificate was given and payment demanded, were almost entirely of one kind authorized by the government as currency. They thus being lawful money of the United States, the court were bound to take judicial notice of that fact." The certificate was considered negotiable. Chief Justice Church, in a still later decision, *Frank v. Wessels*, 64 N. Y. 155, 158, said: "The objection that the instrument, before the court, is not a promissory note, because payable in paper currency, is answered by the suggestion that this must be taken to refer to the legal tender paper currency which, under the United States laws and decisions, is money."

THE AMOUNT TO BE PAID MUST BE CERTAIN: *Gaar v. Louisville Bank Co.*, 11 Bush, 180; *Lime Rock F. & M. Ins. Co. v. Hewitt*, 60 Me. 407, where a note promising to pay two hundred and fifty dollars, and such other premiums as should arise, was held non-negotiable: *Cashman v. Haynes*, 20 Pick. 132; *Bolton v. Dugdale*, 4 B. & Ad. 619. The certainty of the amount is relied upon as a requisite not complied with in those cases where the instrument stipulates for the payment of attorney's fee and costs if the bill or note is not paid at maturity. The decisions on the effect of such an addition are conflicting. One line of adjudications maintains that a note otherwise negotiable is not rendered non-negotiable by the addition of a stipulation to pay the costs of collection including a reasonable attorney's fee. This position is founded on the theory that the stipulation does not affect the certainty of the amount due at maturity; and the only uncertainty thereby created is in the amount recoverable in case of non-payment, and after the element of negotiability has ended. Adopting this view are: *Seaton v. Scovill*, 18 Kan. 433; *Gaar v. Louisville Bank Co.*, 11 Bush, 180; *Stoneman v. Pyle*, 35 Ind. 103; *Dietrich v. Baylie*, 23 La. An. 767; *Sperry v. Horr*, 32 Iowa, 184. The other doctrine, announced by the supreme courts of Missouri and Pennsylvania is, that the insertion of a clause stipulating for the payment of counsel fees and costs, renders the instrument non-negotiable: *First National Bank v. Gay*, 63 Mo. 33; *Woods v. North*, 84 Pa. St. 407.

Other phrases are sometimes introduced into notes waiving benefit of valuation, appraisalment, stay and exemption laws. A note containing such an addition was construed, in *Zimmerman v. Anderson*, 67 Pa. St. 421, and the words which were urged as making the instrument non-negotiable, were pronounced to add to rather than clog the negotiability. "The words do not contain any condition or contingency, but after the note falls due and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it." See, also, 1 Daniel on Neg. Inst., sec. 61.

THE INSTRUMENT MUST BE PAYABLE UNCONDITIONALLY, and at all events, in order to be negotiable. Payment should not be dependent on any contingency, either as to time or the fund out of which payment is to be made, or the parties by or to whom payment is to be made: *Eldred v. Malloy*, 2 Col. T. 320. A note payable when a certain estate is settled, is not negotiable: *Husband v. Epling*, 81 Ill. 172; nor one payable when certain dividends are declared: *Brooks v. Hargreaves*, 21 Mich. 255; or when a certain amount

is collected: *Corbett v. Georgia*, 24 Ga. 287. Chief Justice Campbell, in *Brooks v. Hargreaves*, speaking of the necessity of having a fixed, certain, time when a note shall be payable, says: "That it must be payable at a time which must certainly arrive in the future, upon the happening of some event, or the completion of some period not depending on the future volition of any one." This language expresses the opinion entertained by many of the courts in this country, that if the time must certainly come, although the particular day is not mentioned in the note, the instrument is negotiable, as the fact of payment is then certain. Illustrative of this proposition are: *Capron v. Capron*, 44 Vt. 412; *Ubsdell v. Cunningham*, 22 Mo. 124; *Jordan v. Tate*, 19 Ohio St. 586; *Works v. Hershey*, 35 Iowa, 340; *Ernst v. Steckman*, 74 Pa. St. 13; *Walker v. Woolen*, 54 Ind. 164; *Gardner v. Barger*, 4 Heisk. 669; *Palmer v. Hummer*, 10 Kan. 464; *Crooker v. Holmes*, 65 Me. 195.

A promise to pay "on or before" a day mentioned, states the time of payment with sufficient certainty. Upon a note containing those words, action was brought in Michigan, and the following interpretation given thereto by Judge Cooley: "It seems to us that this note is payable at a certain time. It is payable certainly, and at all events, on a day particularly named, and at that time and not before, payment might be enforced against the maker. It is impossible to say that this paper makes the payment subject to any contingency, or puts it upon any condition. The legal rights of the holder are clear and certain; the note is due at a time fixed and it is not due before. True, the maker may pay sooner, if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings. It ought not to be questioned for the sake of any distinction that does not rest upon sound reason, and we can discover no sound reason for the distinction here insisted upon:" *Mattison v. Marks*, 31 Mich. 421, 423; see, also, *Jordan v. Tate*, *supra*.

The making of an instrument payable out of a particular fund is attaching such a condition thereto as destroys its negotiable quality. The condition is the sufficiency of the fund to discharge the instrument. Cases recognizing this principle are: *Averett v. Booker*, 15 Gratt. 165; *Wadlington v. Covert*, 51 Miss. 631; *Richardson v. Carpenter*, 46 N. Y. 661; *Worden v. Dodge*, 4 Denio, 159; *Corbett v. State*, 24 Ga. 287; *Harriman v. Sanborn*, 43 N. H. 128; *Munger v. Shannon*, 61 N. Y. 258.

Negotiable instruments, most generally employed in commercial circles are promissory notes, bills of exchange and bank checks, drawn in accordance with the requisites above outlined. There are, however, other instruments possessing the characteristics of negotiability, in whole or in part, to the consideration of some of which we pass.

MUNICIPAL BONDS and bonds issued by corporations for moneys raised to carry on corporate works, have been endowed with the character of negotiability, where it appears that they were meant to be negotiable. This question was presented to the supreme court of the United States in *White v. Vermont etc. R. R. Co.*, 21 How. 575, in an action on certain bonds issued by the defendants. The bonds were payable in blank, and prior to the commencement of the suit the plaintiff inserted "Selden F. White, or order." To the objection that the bonds were not negotiable, Justice Nelson, delivering the court's opinion, replied: "As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think

the usage and practice of the companies themselves, and of the capitalists and business men of the country, dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question: *Morris Canal Co. v. Fisher*, 1 Stockton, 667, 699; *Delafeld v. Illinois*, 2 Hill, 177; S. C., 8 Paige, 527; *Mich. Bank v. N. Y. and N. H. R. R. Co.*, 3 Kern. 625; *Carr v. Le Fevre*, 27 Pa. St. 418; *Craig v. Vicksburg*, 31 Miss. 216; *Chapin v. Vt. and Mass. R. R. Co.*, 8 Gray, 575."

The same principle is reaffirmed in *Mercer Co. v. Hackett*, 1 Wall. 95; *Hotchkiss v. National Banks*, 21 Id. 354; *County of Beaver v. Armstrong*, 44 Pa. St. 69; *National etc. Bank v. Hartford R. R. Co.*, 8 R. I. 375; *De Voss v. Richmond*, 18 Gratt. 352; *Easton etc. R. R. Co. v. Hunt*, 20 Ind. 457; *Clark v. Des Moines*, 19 Iowa, 213; and see note to *Evertson v. National Bank*, 23 Am. Rep. 15.

COUPONS.—Usually attached to the bond issued by corporations are coupons for the payment of the interest accruing thereon; and questions have arisen, in many instances, whether or not these coupons, when detached from their original bonds, were negotiable. It may be stated to be the settled rule in this country, that such coupons, in the form in which they are generally drawn, are negotiable separately from the bond itself: *Nat. Ex. Bank v. Hartford etc. R. R. Co.*, 8 R. I. 375; *Spooner v. Holmes*, 102 Mass. 503; *Clark v. Iowa City*, 20 Wall. 583; *Beaver Co. v. Armstrong*, 44 Pa. St. 63; *Evertson v. Nat. Bank of Newport*, 66 N. Y. 14. The distinction between negotiable and non-negotiable coupons is well defined in the case from 66 N. Y. 14. The attention of the court was directed to certain coupons and interest warrants, so called. The plaintiff's right of recovery depended upon the instruments being negotiable. The coupons were in this form:

"\$35. THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY \$35.

"Will pay the bearer, at its agency in the city of New York, thirty-five dollars, in gold coin, on the first of April, 1871, for semi-annual interest on bond No. ———. A. P. LEWIS, Secretary."

The warrants were in the following form:

"\$35. INTEREST WARRANT FOR THIRTY-FIVE DOLLARS \$35.

"Upon bond No. ———, of the Danville, Urbana, Bloomington and Pekin Railroad Company. Payable in gold coin, at the office of the Farmers' Loan and Trust Company, in the city of New York, April 1, 1871.

"W. J. ERMENBOUT, Secretary."

With regard to the coupons, the court, per Allen, J., say that they "are in terms distinct promises to pay the bearer the amount specified therein at a day and place named, and are, within the authorities, promissory notes for the payment of money to the holder, and transferable by delivery, although detached from the bonds to which they refer. The fact that they are declared to be for interest upon bonds specified by their numbers, does not destroy their negotiability when separated from the bond, or impair the title of one purchasing from another without production of the bond. The bonds themselves, although under the seal of the company, are negotiable within the repeated decisions of our courts: *White v. V. and M. R. R. Co.*, 21 How. (U. S.) 575; *Gelpcke v. Dubuque*, 1 Wall. 175; *Clark v. Iowa City*, 20 Id. 583; *Brainerd v. N. Y. and Harlem R. R. Co.*, 25 N. Y. 496; *Dinsmore v. Duncan*, 57 Id. 573; *Haven v. Grand Junc. R. R. Co.*, 106

Mass. 88. The cases of *Myers v. N. Y. and Cumberland R. R. Co.*, 43 Me. 232; and *Jackson v. The Same*, 48 Id. 147, holding somewhat different doctrines, cannot be regarded as authority."

Referring to the warrants, the court continued: "The instruments are not upon their face negotiable; they are not payable to any person by name or his order, or to the bearer, or to the order of a fictitious person. In all the cases to which reference has already been made, the coupons contained distinct promises to pay the bearer the sums named therein, at a time and place specified. * * * In this, as in other contracts, its negotiability depends upon its terms, and the rule is, with certain exceptions, not applicable to this case; that in instruments for the payment of money, if no one be designated as payee, either by name or as bearer, the instrument is not a promissory note. If these warrants are not promissory notes, they are not negotiable; they are neither checks nor bills of exchange: 1 *Parsons on Bills*, 33, and note; *Brown v. Gilman*, 13 Mass. 158; *Gibson v. Minet*, 1 H. Bl. 569; *Douglas v. Wilkeson*, 6 Wend. 637; *Walrad v. Petrie*, 4 Id. 575." After a review of some of the adjudications, the following conclusion is reached: "The contract embodied in these interest warrants, so far as any contract can be implied, cannot, upon principle or within any well considered authority, be made an exception to the general rules, by which the negotiability of promises for the payment of money is determined. There is no usage or custom proved that would give these warrants a negotiable character, even if custom and usage so recent as one applicable to these instruments would be, could change their legal effect."

The negotiable character of these coupons is not lost, although the bonds be paid and satisfied: *Clark v. Iowa*, 20 Wall. 583; *Nat. Ex. Bank v. Hartford R. R. Co.*, 8 R. I. 375.

TREASURY NOTES of the United States are deemed negotiable instruments. Nor does the clause in such notes, giving the holder option, upon maturity, to convert them into bonds, destroy their negotiability so long as the option is not exercised: *Dinmore v. Duncan*, 57 N. Y. 573; *Vermilye v. Adams Express Co.*, 21 Wall. 138, where the character of these notes is clearly described.

CERTIFICATES OF DEPOSIT, when expressed in negotiable words, are negotiable. They are regarded in substance and in legal effect as promissory notes: *Brunnagim v. Tallant*, 29 Cal. 503; *Cate v. Patterson*, 25 Mich. 191; *Drake v. Markle*, 21 Ind. 433; *Kilgore v. Bulkley*, 14 Conn. 362; *Fells Point Savgs. Inst. v. Weedon*, 18 Md. 526; *Pardee v. Fish*, 60 N. Y. 265, 268, wherein it is asserted, per Miller, J.: "It is laid down in *Parsons on Bills*, vol. 1, p. 26, that a certificate of deposit in the usual form possesses all the requisites of a negotiable promissory note, and that such is the prevailing opinion. Numerous cases are cited, mainly from other states, to sustain this doctrine. In *Miller v. Austen*, 13 How. U. S. 218, 223, this very question was distinctly presented, and the same principle was upheld. Catron, J., who delivered the opinion of the court, says: 'The established doctrine is that a promise to deliver, or to be accountable for so much money, is a good bill or note. * * * Every reason exists why the indorser of this paper should be held responsible to his indorsee that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note, and as such note the state courts have generally treated certificates of deposit payable to order, and the principle adopted by the state courts in coming to this conclusion are fully sustained by the writers of treatises on bills and notes.'" A certificate of deposit payable "in currency" was held in *Hue*

v. *Hamblin*, 29 Iowa, 501, not to be negotiable, it not being payable in money. This is pursuance of a doctrine heretofore adverted to.

CERTIFICATES OF STOCK are not negotiable instruments: *Shaw v. Spencer*, 100 Mass. 382; *Sewall v. Boston Water Power Co.*, 4 Allen, 282; *Hall v. Rose Hill etc. R. R. Co.*, 70 Ill. 673; *Mechanics' Bank v. N. Y. and New Haven R. R. Co.*, 13 N. Y. 627; *Weaver v. Barden*, 49 Id. 286, and cases cited; *Winter v. Belmont Mining Co.*, 53 Cal. 428; *Sherwood v. Meadow Valley M. Co.* 50 Id. 412. But by reason of the very generally prevailing belief on the part of business men that such certificates are at least quasi negotiable, and in order to protect the vast commercial transactions that have been entered into under that belief, the court of appeals of New York, in a series of decisions, have adopted a rule which both recognizes certificates of stock to be non-negotiable, and at the same time confers certain incidents of negotiability upon them. This series includes: *Bush v. Lathrop*, 22 N. Y. 535, which, however, is disapproved in *Moore v. Metropolitan Bank*, 55 Id. 41; *McNeil v. Tenth Nat. Bank*, 46 Id. 325; and the rule arises out of the application of the doctrine of estoppel to the customary method of transferring certificates of stock. In *Merchants' Bank v. Livingston*, 74 N. Y. 226, the doctrine is thus stated: A bank transfer of a certificate of stock with irrevocable power of attorney to transfer signed by the person who appears by the certificate to be the owner like that used in this case confers upon the holder of the certificate and power of attorney the apparent legal and equitable title to the stock, and a bona fide purchaser of such stock from such holder can hold the stock against the real owner, who is estopped from asserting his title. A careful analysis of these New York cases will be found in Pomeroy's Remedies and Remedial Rights, secs. 160, 161.

HUNT v. CHAMBERLAIN.

[3 HALSTED, 336.]

POWER OF ATTORNEY from two persons to another, authorizing the latter to appear and confess judgment in action brought "against us," does not authorize a confession against one only.

IN ERROR. The opinion states the case.

Vroom and Wood, for the plaintiff in error.

Wall and L. H. Stockton, contra.

By Court, FORD, J. This writ of error brings up a judgment recovered in Hunterdon pleas, by the executors of John Chamberlain, deceased, against Ralph Hunt, on a bond and warrant of attorney. The bond was not made by Ralph Hunt alone, but by Daniel Hunt and Ralph Hunt, wherein they bound themselves jointly and severally. The warrant was to any attorney to appear to an action to be brought, as it says, "against us." After the death of Daniel Hunt, judgment was confessed by virtue of this warrant in an action against Ralph Hunt alone. The first exception taken to the record is, that the warrant con

tains no authority to appear to an action against only one of them, and confess judgment against him alone. In determining this matter we are to take the precedents and principles of the common law for our guide, and in doing so we shall find this judgment inconsistent with both. First, as to precedents, I do not know that the question ever came up in this court before; but it has presented itself frequently in the books, and judgments of this kind have been disallowed in all the courts of Westminster hall. In the case of *Still v. Still*, 1 Barn. 35, the court of common pleas fell into the error of allowing it, but they soon afterwards set themselves right by refusing leave in the case of *Laycock v. Garforth*, 2 Barn. 38, which was in the year 1751, upwards of half a century ago, and from that time to this day it has never been permitted in the common pleas. We may well suppose that court, which is sometimes called the lock and key of the common law, would not have unsettled one of their decisions, unless they had discovered in it a great departure from reason and principle.

With regard to the king's bench, they never fell into this error, but uniformly refused leave to enter judgment against the survivor upon a joint warrant. In the case of *Gee v. Lane*, 15 East, 592, it was refused by the whole court; and Ellenborough, C. J., said, an authority to enter judgment against "us," will not warrant a judgment against one alone; the authority must be pursued; we cannot violate it. There never has occurred in the king's bench one valid case, as far as I can learn, to the contrary of *Gee v. Lane*. It is not intended that the case of *Todd v. Dodd*, Sayer, 5, was in the king's bench; nor, according to Sayer's report, that it was the other way; but the accuracy of it as reported by him is highly questionable. Though in *Gee v. Lane*, it would have been an authority in point for the plaintiff, it was neither cited from Sayer, by the counsel, nor the least notice taken of it by him or the court. And its being treated with such silent neglect, both by the bar and the bench, renders it rather suspicious. It could not have been overlooked, for *Todd v. Dodd*, is reported both by Sayer and Sergeant Wilson, and authors in quoting it refer to both those reporters. They are undoubtedly the same case, from the identities of name, court, year, and term; yet Abbott does not cite the case from Sayer, who has it in point for him, but from 1 Wils, 312; though according to Wilson, it has little, if any, bearing in favor of the motion. Sayer represents the warrant as having been given by two persons, one of whom was dead, but he names neither of them; Sergeant Wilson represents the warrant as being given

by only one person, Richard Dodd, whom he names, and the present question could not have been before the court. If, therefore, C. J. Lee really said what is ascribed to him by Sayer, it must have been an *obiter dictum*, a random observation collateral to the point, which Sergeant Wilson deemed unnecessary to be put down. It was a warrant to confess judgment to two persons and one of them being dead, leave was asked to enter it up in favor of the survivor, and it was granted. Laying this contradicted case aside, there never was a time, in that court, when they could grant leave to enter judgment against one person only, on a joint warrant executed by two. Therefore for upwards of half a century these courts have constantly refused leave to enter such judgments, because it would be unauthorized by the warrant, and consequently illegal. It would be contrary to every allowed precedent that can be found. I have also sought with some care the light that is often shed from the tribunals of neighboring states, but have not found a single departure from the current of cases before mentioned; and it would appear to me highly indiscreet to put afloat what has been so thoroughly settled heretofore.

But, secondly, the judgment is at variance with that fixed principle or maxim of the common law that delegated powers must be strictly pursued; that they can never be enlarged by construction, and are never to be exceeded. If a power be given to an attorney or agent to sell ten acres out of a large tract, courts of justice will no sooner enlarge it by construction to twelve acres, than to twelve hundred. A different rule would not only deter men from ever delegating power to others, and so put a stop to factors and agencies in commerce; but also vest a most dangerous discretion in courts of justice to vary the agreements of parties. Ellenborough, C. J., in *Gee v. Lane*, gives to such an act its true character, in calling it a violation of powers. The present warrant empowers an attorney to appear in an action to be brought against Daniel Hunt and Ralph Hunt both, and extends no further; its language is, "to an action to be brought against us and confess us." They were willing to stand together in judgment, and to meet an execution by their joint means and executions. But it gives no authority for placing one of them in judgment by himself, and leaving him all alone to break an execution for the whole sum while the means and estate of the other remain untouched and undisturbed.

Judgment by confession is followed by an immediate seizure

of the goods and estate of one, while a remedy against his co-obligor may come so late as not to arrive till after he is ruined. If the creditor is left to proceed on his joint and several obligation in the ordinary way, he will bring an action against each, especially if requested so to do; one against the survivor and another against the representatives of the deceased; or the survivor, if he be only security, might have a little time to obtain relief from the estate of the principal; and if these facilities are taken away and he involved in the evil consequence of losing them, the blame cannot fall upon the warrant of attorney, but on the court for suffering the limited power therein expressed to be exceeded and violated. A warrant of attorney by two persons may, like an obligation, be drawn joint or joint and several; and it will never do to confound together things which, in their nature, are so distinct. If innovations must be made, it could be no less obnoxious in principle to convert a joint obligation by construction, in joint and several, than to take this violent course with a power of attorney. I, therefore, feel constrained as well from the force of principle as weight of precedent, to consider the warrant of attorney in this case as no authority for the entry of the judgment, and, consequently, that the judgment is erroneous. A consideration of the remaining objections becomes evidently unnecessary.

Let the judgment be reversed.

CASES
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS AND THE
CORRECTION OF ERRORS.
OF
NEW YORK.

MCDONALD v. NEILSON.

[2 COWEN, 139.]

SHERIFF'S DUTIES WHEN ACTING UNDER EXECUTION.—An officer having a writ in his hands, must take all needful and lawful means to enforce it. He must exercise a sound discretion as to time, place and manner of sale; and he must consult his own judgment and not submit to be so controlled by either party as to oppress or ruin the other.

CONTRACT PROCURED BY OPPRESSION of the plaintiff and an officer acting under a writ of execution, will be relieved against in equity, by requiring it to be delivered up and canceled on payment of the amount due on the execution, and of all other demands which are equitably due to the plaintiff.

INSTRUCTIONS BY PLAINTIFF in execution need not be obeyed by the sheriff, if they are oppressive or will produce a great sacrifice of property.

POSTPONEMENT OF SHERIFF'S SALE should be made even against the objections of the plaintiff, if necessary to prevent a sacrifice of the property.

PRESUMPTION.—A legal act is presumed to be done for a legal purpose, until the contrary is made to appear by satisfactory evidence; but if it be shown to be done for an illegal purpose, equity will restrict its operation to the objects which might legally be accomplished by it.

SET-OFF IN EQUITY is governed by the same rules as at law.

CONSIDERATION.—The voluntary restoration of that to which one is entitled is not a sufficient consideration to support a contract; nor is an agreement of a son that a father shall deduct a certain sum from his portion, a sufficient consideration.

DUTY OF OFFICERS IN EXECUTING PROCESS.—The law will make liberal intendments in favor of ministerial officers, but will not sustain them in a needless resort to extreme and oppressive measures.

DUTY OF SHERIFF is to obey *feri facias* by having the money at the return day; to show no favor; to permit no unreasonable delay; and to be guilty of no oppression or needless severity.

RELIEF AGAINST IMPOSITION AND OPPRESSION may be obtained in chancery, even by setting aside deeds and judgments; but the applicant must do equity, must be guiltless of fraud and chicanery; must not have been guilty of delay to the prejudice of others, and the hardship complained of must not be the result of his own misconduct.

APPEAL from the court of chancery. The bill was filed by the respondent. One of its objects was to set aside a bond and mortgage for twenty-five thousand dollars, executed by him to McDonald, one of the appellants, because, as was alleged, he was compelled to make the mortgage to avoid an illegal and oppressive use of a *fiery facias* against his property. In August, 1819, the appellants, McDonald & Livingston, recovered judgment against the respondent for four hundred and eighty dollars and eighty-three cents. On this judgment a *fiery facias* issued, under which appellant Griffith, as deputy sheriff, by direction of McDonald, was proceeding to sell respondent's property at a great sacrifice. To prevent this sale the securities in question were given. McDonald in his answer alleged that in May, 1818, he recovered judgment for one thousand six hundred and forty-five dollars and thirty-three cents, against John Neilson, jun., a son of respondent, on a note payable to one Jacob Boyce, or order, and indorsed by him for the accommodation of J. Neilson, jun.; that this note was received by McDonald in part payment for goods sold by him to J. Neilson, jun.; that McDonald sued out *fiery facias* on the last-named judgment, under which he and the appellant Livingston levied upon personalty of Neilson, jun., of the value of eight hundred dollars or one thousand dollars; that the respondent claimed the property so levied on, and brought an action therefor, which was tried in May, 1819. On this trial the respondent claimed the goods by purchase from D. Newland, who had bid them in for three hundred and fifty-three dollars and thirty-three cents, at a sheriff's sale, on January 27, 1817, under an execution in favor of Rockwell and Stebbins and against J. Neilson, jun. The respondent, after the sale, paid the amount of the bid to Newland, who then relinquished the bids to him. He also paid the balance of the judgment. Most of the articles sold remained in possession of J. Neilson, jun.

In defending the replevin suit, the appellants, Livingston and McDonald, proved, in addition to the other facts stated, that a bureau and trunk, containing a considerable amount of goods, were sold without exposing their contents; that in 1816, J. Neilson, jun., sent a raft to New York worth one thousand dollars or one thousand two hundred dollars, which he had

contracted to deliver to McDonald, in New York, in part payment of the debt due him; that the raft was withheld from him by the respondent, who secured the proceeds thereof; that an action of trover was commenced by McD. against S. Hewett, under whose charge the raft had been sent to New York; that in this last action, J. Neilson, jun., testified that his father had received the proceeds of the raft, and on that account, had agreed to pay certain debts due from J. Neilson, jun., among which was the Rockwell and Stebbins judgment; that the value of all the goods seized by appellant, and Livingston, as deputy, was about six hundred and one dollars; that the value of the goods seized, but not embraced in the pleadings in the replevin suit, was two hundred and thirty-five dollars and sixty-nine cents, leaving the value of the goods named in the said pleading three hundred and sixty-five dollars and thirty-one cents, for which and interest, making in all three hundred and sixty-five dollars and thirty-one cents, the jury rendered a verdict in favor of McDonald and Livingston. Final judgment was entered in August, 1819, on this verdict, for four hundred and eighty dollars and eighty-three cents and costs. On November 10, 1819, McD. delivered *fi. fa.* on said judgment to Livingston, who, on the thirteenth of the same month, seized the personal property of the respondent and advertised it to be sold on the twenty-second. The proceedings under this *fi. fa.* resulted in the bond and mortgage sought to be vacated.

McDonald, in his answer, averred that the consideration of the bond and mortgage was the relinquishment of the bids made at the sale, the assignment to respondent of the judgment against J. Neilson, jun., and the note indorsed by J. Boyce, on which said judgment had been obtained, and also another note against Neilson, jun., also indorsed by Boyce, and the discharge of the judgment in replevin; and that his debt against Neilson, jun., was for goods sold in the autumn of 1815, to the amount of two thousand one hundred dollars. The insolvency of Boyce was admitted, as also were the rigorous proceedings under the *fi. fa.*, as stated in the opinions of the judges. But the rigor of these proceedings was stated to be necessary to make advantageous purchases, and thereby save a large portion of the amount due from Neilson, jun.; McD. then and still believing that the respondent had fraudulently combined with his son to cheat McD., and that the elder Neilson was morally bound to refund to McD. the proceeds of the raft.

The other facts are stated in the opinions of the judges.

B. F. Butler, for appellants, contended that the decree ought to be reversed. Upon the admissibility of *Griffith and Livingston*, as witnesses, he cited *Fenton v. Hughes*, 7 Ves. 287; *Dummer v. Corporation of Chippenhan*, 14 Ves. 251; *Whitworth v. Davis*, 1 Ves. & B. 550. Injunction will not be granted, though coin is scarce, and a distress is made through pique: *Bray v. ———*, 1 Mad. Ch. 30. If a claim is good as a matter of abstract justice, equity will not deprive a party of it, though obtained unfairly: *Small v. Brackley*, 2 Vern. 602; *Sir John Fogg's case*, 1 Eq. Cas. Abr. 354; *Stapleton v. Stapleton*, 1 Atk. 10; *Pullen v. Ready*, 2 Id. 291; *Stephens v. Bateman*, 1 Bro. Ch. 25. He who asks equity must do equity: *Cadman v. Horner*, 18 Ves. 11; *Wardour v. Beresford*, 1 Vern. 452. Misrepresentation disqualifies a person from receiving relief: *Cadman v. Horner*, 18 Ves. 11. A security will never be avoided in equity until payment is made of what is actually due: *Bates v. Graves*, 2 Ves. jun. 294; *Lord Cranstown v. Johnston*, 5 Ves. jun. 277.

Van Vechten and Henry, for respondent. The law exacts the utmost fairness and integrity from officers who conduct execution sales: *Troup v. Sherwood*, 4 Johns. Ch. 228, 254; *Jones v. Caswell*, 3 Johns. Cas. 29 [2 Am. Dec. 134]; *Hewson v. Deygert*, 8 Johns. 333; *Jackson v. Newton*, Id. 362; *Tiernan v. Wilson*, 6 Johns. Ch. 414; *Wooddye v. Baily*, Noy, 59; *Stead's Ex. v. Course*, 4 Cranch, 403. To avoid solemn legal instruments, technical duress to the person is not indispensable: *Attorney-general v. Sothom*, 2 Vern. 497; *Reigal v. Wood*, 1 John. Ch. 406; *Barnesly v. Powell*, 1 Ves. 120, 284, 289. Fraud and imposition are exceptions to all rules: *Fell v. Riley*, Cowp. 281.

T. J. Oakley, in reply. *Griffith and Livingston* were competent witnesses; a defendant against whom no decree can be entered may testify: *Piddock v. Brown*, 3 P. Wms. 288; *Beebe v. Bank of N. Y.*, 1 Johns. 529 [3 Am. Dec. 353]; *Collon v. Luttrell*, 1 Atk. 451; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Mau v. Ward*, 2 Atk. 228; *Whitworth v. Davis*, 1 Ves. & B. 549. An act will not be set aside if done under the advice of counsel: *Pullen v. Ready*, 2 Atk. 591; *Stephens v. Bateman*, 1 Br. Ch. 25.

WOODWORTH, J. The object of the bill is to be relieved against a bond and mortgage, given by the respondent to William McDonald, and a note of fifty dollars to Seth Eddy.

The appellants are charged as parties to a fraudulent combination to oppress the respondent, by the sacrifice of his prop-

erty at a sheriff's sale, in order to indemnify themselves for certain debts against John Neilson, jun., a son of the respondent.

On the twenty-second of November, 1819, the appellants and others attended the sale, when personal property to a large amount was sold by Griffith, and purchased chiefly by McDonald and Eddy. It is not necessary to occupy time by a minute statement of facts. I shall merely observe that the respondent was a man in affluent circumstances, having large real and personal estate, of from twelve thousand to fifteen thousand dollars. The amount of the execution was four hundred and eighty dollars and eighty-three cents. It appears that the respondent requested Griffith, the officer, to delay the sale until he could send about three miles and procure the money; Griffith declined taking anything but specie. The respondent then offered to pay in specie the next day, or as soon as a person could go to Waterford and return; security was offered for the performance. These propositions were rejected on the ground that McDonald insisted on an immediate sale, although the execution had been but a few days in the officer's hands. McDonald, in his answer, admits the demand of specie was with the view of preventing the respondent from obtaining the means of satisfying the execution with as much facility as he otherwise might have done, and with the view of making advantageous purchases, in the hope of saving a large amount due to him from John Neilson, jun.; believing that the respondent had fraudulently combined with his son to prevent the collection, and was morally bound to refund the avails of a raft, of which he fraudulently got possession. After selling the out-door property, and when the officer was about to commence the sale of the furniture, the respondent was prevailed on by the advice of his friends, and in order to prevent a further sacrifice, to make an accommodation by which two thousand five hundred dollars was secured to McDonald, in satisfaction of the execution and his debt against John Neilson, jun. The property sold was then given up.

I have thus glanced at the material facts; the question is, can a contract, entered into under such circumstances, be upheld in a court of equity? I am clearly of opinion it cannot, without overruling long established and well settled principles, hitherto considered of vital importance to protect against that species of oppression, which is sought to be justified under the forms of law. With respect to Griffith, certain duties devolved on him as a public officer; he was, undoubtedly, to take all necessary and lawful means to comply with the exigency of the writ, and

thereby to secure to the plaintiff in the execution, the fruits of his recovery. As to time, place and manner of sale, a sound discretion was vested in him; but in full confidence that it would not be abused. It is indispensably necessary to the due administration of justice, that the exercise of this discretion should never be under the direction of one party, so as to oppress and bring ruin on the other. The officer is bound to consult his own judgment, to act firmly but temperately, and in no case can he, without just reprehension, lend himself to the views of either party, or become the instrument to avenge their real or imaginary wrongs.

The conduct of the officer was altogether unjustifiable, wanton and oppressive; it is neither palliated nor excused by proving that he acted under the orders of the plaintiff in the execution. After property valued at one thousand two hundred dollars and upwards, had been sold for three hundred dollars, a suspension takes place, the negotiation is concluded and the mortgage given. Did the parties treat on equal terms? Was the respondent under no restraint? Was he induced to compromise to save his property from further sacrifice? It seems to me there can be but one opinion on this subject. If so, can a lawful contract be upheld by such means? Here was a pressure upon distress which, in the view of a court of equity, entitled the respondent to relief.

The bond and mortgage must stand as a security for the amount due on the execution, with interest to the time of tender. It is scarcely necessary to cite authorities to prove that where advantage is taken of the party's circumstances, so that he acts not voluntarily but under necessity; where a deed is obtained by undue influence, and the process of law abused, a contract resting on such a basis cannot receive the countenance of a court of justice: *Nichols v. Nichols*, 1 Atk. 409; *Thornhill v. Evans*, 2 Id. 330; 1 Mad. 243; *Gould v. Oxenden*, 3 Bro. P. C. 560; *Thornhill v. Evans*, 6 Bro. P. C. 614; *Lamplugh v. Lamplugh*, 1 Dick. 411.

But it is contended by the appellants, that the mortgage ought to stand as a further security, on the ground that the respondent, after notice of McDonald's equitable interest, fraudulently interfered and prevented his receiving the avails of the raft. The first objection to this is, that the claim for the raft is not in issue between the parties, on the pleadings in this cause. The bill is silent on this subject. The answer of McDonald professes to state the evidence given on the trial of

the suit in replevin; and, among other things, alleges that the defendants proved that John Neilson, jun., in 1816, sent a raft to New York worth one thousand or one thousand two hundred dollars, which he had contracted in writing to deliver to McDonald, in part payment of the debt due to him; that the raft had been withheld from him by the respondent, who received the avails; and that on a trial of an action of trover against Hewitt, John Neilson, jun., testified that the respondent was to pay out of the avails certain debts, among which was a debt due to Rockwell and Stebbins. In another part of the answer, McDonald states that his conduct at the sale was in the hope of saving a portion of the debt due to him from John Neilson, jun.; but it is nowhere averred that the respondent in this cause was bound to account for the raft, nor is it urged as a ground of equity, that the bond and mortgage should stand as a security for the same.

It is impossible, from the scope of the answer, to make out that any such claim was relied on in this cause. The proof given on the trial at law, and the belief that the respondent had fraudulently combined, are suggested as justifiable grounds in the opinion of McDonald, for pursuing a rigorous course at the sale, and for believing that the respondent was morally bound to account for the raft. These facts are introduced with others, to show the motives which governed the appellant. The respondent could not consider himself called on to admit or deny this statement. It was not put in issue. The respondent has not gone into any proof respecting the raft, nor the former trial; reposing himself, as he well might do, that by the pleadings they were not drawn in question. The rule laid down in *James v. McKennon*, 6 Johns. 564, is, that "every material allegation should be put in issue by the pleadings, so that the parties may be duly apprised of the essential inquiry, and may be enabled to collect testimony, and frame interrogations, in order to meet the question." So, also, in the case of *Stewart v. The Mechanics' and Farmers' Bank*, 19 Johns. 505, it is laid down as an undeniable principle, that the decree of a court of equity must be founded on some matter put in issue between the parties. It is bound to decide according to the allegations and proofs as much as a court of law. But admitting the claim for the raft is sufficiently alleged to call on this court for an opinion, whether the bond and mortgage shall stand as a further security for whatever may appear to have been received by the respondent, I will next examine its valid-

ity. The claim is for unwarrantably interfering, so as to prevent a delivery of the lumber. Could McDonald maintain an action at law to recover damages? I apprehend not; for he never acquired title to the property. His claim rested on an executory contract made with John Neilson, jun. In *McDonald v. Hewit*, 15 Johns. 349 [8 Am. Dec. 211], the supreme court held that the contract was executory, and did not vest the property; and, therefore, the plaintiff could not maintain trover for the conversion. The right of action would be against John Neilson, jun. The case appears to be this: The father interfered, and caused the fund which the debtor had stipulated to be applied to McDonald, to be diverted, and paid to other creditors. I think the conduct of the respondent was reprehensible; but the question is, has the law provided a remedy for the act? It is not included within the legal notion of fraud. I have not been able to discover any authority that establishes a liability in such a case. None was adduced on the argument. From the acquiescence of McDonald, after the decision in the cause against Hewit, and no attempt to sustain a prosecution against the respondent, it may be inferred that a recovery was considered hopeless.

John Neilson, jun., testifies that, although the interference of his father was without his authority, yet he afterwards approved of it, and that the respondent has paid to his creditors much more than the avails of the timber. It is true that on the trial against Hewit, he testified that the debt of Rockwell and Stebbins was to be paid by the respondent, and on the subsequent trial he does not prove that fact. If his testimony is impeached in this particular, the appellant has had the benefit of it in the replevin suit, in which he succeeded. The execution in favor of Rockwell and Stebbins was held to be fraudulent, and probably on the ground that the respondent had paid that execution with money received on the sale of the timber.

Is, then, this claim respecting the raft, for which McDonald could not sustain an action either at law or in equity, as plaintiff, capable of being now resuscitated and enforced as an equity, which the respondent is bound to satisfy? It cannot be viewed in the light of a set-off. To constitute that, there must be mutual debts: Montague, 17. A court of equity follows the same rules as a court of law, as to set-off. The debts must be between the parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated: *Duncan v. Lyon*, 3 Johns. Ch. 359 [8 Am. Dec. 513]; *Ambler*, 407;

3 Cai. 84: 2 Johns. 150, 155. We must conclude from the evidence that the avails of the raft are not in the respondent's hands. Although McDonald is a sufferer by the interference of the respondent, there seems to be no doubt that the sum has been fully applied to other creditors. If it be conceded that McDonald could have no redress, suing as a plaintiff, it certainly disposes of the claim to have the mortgage stand as a security. It would be altogether arbitrary to say that an injury, for which there is no redress by the laws of the land, should be recognized in equity, as a condition upon which relief will be granted in a case, of itself, not admitting of doubt.

The decree as to Eddy is erroneous. He attended as a bidder, and had a right to purchase and retain his purchase. He cannot be affected by the conduct of the other appellants, unless there is proof of combination between them, for the purpose of sacrificing the respondent's property. The proof does not rise higher than slight suspicion, and cannot lay the foundation for a judgment or decree. I will notice the principal facts relied on to implicate him. Henry Neilson says he was impressed with an opinion that the appellants were combined together, and acted in concert; but no reasons are given, except that Eddy was present, and one of the purchasers. John Walker says, that from the circumstance of the appellants bidding at the sale, counseling together, and the declaration of Griffith, that he would be ruled in his conduct by McDonald, he believed all the defendants acted in concert. Now the premises did not warrant any such conclusion. The fact is neither proved nor disproved. Besides, what connection had the declarations of Griffith with the question of combination?

Walter Broughton says he was in the store of Eddy in the evening of the day of sale; that McDonald, Livingston and Griffith came in; that much conversation took place, and the appellants appeared to be gratified at the result of the sale; that he saw money, in gold, pass between McDonald and Eddy; that Eddy checked the conversation, which the witness thought was out of kindness to his feelings—he being a connection of the respondent by marriage. It would be extremely dangerous, as well as unjust, without further explanation, to allow such acts and declarations as evidence of combination.

If the testimony of Griffith is admitted, it appears that the gold, which passed between him and Eddy, was a repayment of the money bid by Eddy, and paid to the officer. My conclusion, however, from a review of the pleadings and proofs,

would not be affected, if the depositions of Griffith and Livingston are suppressed. R. M. Livingston proves that Eddy offered to pay the amount of the execution, in specie, if his debt of fifty dollars against John Neilson, jun., was secured. Eddy, in his answer, denies any concert or agreement, or that he attended the sale in pursuance of any arrangement. There is no evidence to destroy this denial in the answer. The respondent assumed the payment of Eddy's debt, in consideration of his relinquishing his purchase at the sale. The decree as to Eddy should be reversed, and the bill, as to him, dismissed with costs. As to the other appellants, it should be modified, by directing that the assignment executed by McDonald to the respondent, be delivered up, to be cancelled; and that, in other respects, the decree of the chancellor be affirmed.

SUTHERLAND, J. The merits of this case are in a very narrow compass. The bill, the answers, and the proofs, substantially concur in all the material facts; and the principles of law, which are involved in it, are among the simplest and the best established known in our courts.

William McDonald, in October, 1819, obtained a judgment in the supreme court against John Neilson, the respondent, for four hundred and eighty dollars and eighty-three cents. On the tenth of November following, he caused an execution, against the property of the respondent, to be issued on the judgment, and delivered to the appellant, William Griffith, who was then one of the deputies of the sheriff of Saratoga. It was levied on the thirteenth of November, upon all his personal property, consisting of cattle, horses, hay, grain, farming utensils, and household furniture. Advertisements, in the usual form, were immediately put up, giving notice of the sale, at public vendue, on the twenty-second day of the same month. The respondent was in the city of New York, when the levy was made, and did not return home until the evening preceding the day of sale. He is admitted and proved to have been a man of large real and personal estate, estimated, by all the witnesses, at from twelve to eighteen thousand dollars.

On the day of sale all the appellants went to the house of the respondent, and upon his being informed by Griffith that he had come to sell his property, he requested a postponement of the sale, as he had not there the money sufficient to pay the execution; and, either at that time, or soon after the sale commenced, requested a suspension for a few hours, until he could

send three miles, to the village of Stillwater, and obtain the money. This request was not only refused, but he was informed that nothing would be taken in payment but specie. He then offered the most ample security for the payment of the specie, in as short a time as it could be procured from the village of Waterford, a distance of about thirteen miles. R. M. Livingston, and others who were present, joined the respondent in his solicitations for delay and offers for security, and remonstrated, in the strongest terms, against the harsh and oppressive proceedings of the appellants. Griffith, the deputy sheriff, submitted himself entirely to the directions of McDonald, who refused to suspend the sale, or to take anything in payment but specie. The sale accordingly proceeded, and all the out-door personal property of the respondent, which, at the lowest estimate, is proved to have been worth one thousand two hundred dollars, and, at the highest, two thousand dollars, was sold and bid in by the appellants for an aggregate amount of less than three hundred dollars, leaving two hundred dollars still due upon execution.

In this stage of the proceedings, when the appellants were about entering his house for the purpose of selling his furniture, the respondent, at the urgent solicitation of his friends, consented to propose a compromise with McDonald. McDonald offered to stop the sale and procure a restoration to the respondent of all the property that had already been sold, if he would pay him the amount of a judgment which he held against his son John Neilson, jun., for one thousand six hundred dollars, and also a note of his son, for eight hundred dollars, indorsed by one Jacob Boyce, together with the judgment upon which the sale had taken place; and the respondent finally consented to give him his bond and mortgage for two thousand five hundred dollars, payable in five annual installments; and McDonald accordingly restored to him the property sold, discharged his judgment, and assigned to him the securities against his son and Boyce. John Neilson, jun. and Boyce are both proved then to have been and still to be insolvent.

R. M. Livingston states, "that he and the other friends of the respondent were induced to advise him to settle with the said McDonald, his demands against the said John Neilson jun., by the circumstances that the property already sold out of doors, and what would probably be sold in the house, would amount to more than McDonald would demand as a condition of abandoning the proceedings under said execution; and by

the further circumstance that it was believed that he might **not** be able to regain his property, or its value from McDonald, if it should be carried away by him;" and further states "that he believes that the respondent's principal inducement to **make** such settlement, was the same as actuated him and the respondent's other friends in recommending such settlement."

Upon this simple naked statement of facts, excluding for the present all consideration of the equitable claims which McDonald alleges he had against the respondent, can any man hesitate to say that this sale was most oppressively conducted for the express purpose of compelling the respondent to assume the debt of his insolvent son, which he was under no obligation, either legal or moral, to pay? and are not the common sense and the instinctive feelings of every man outraged by the allegation that the respondent freely and voluntarily executed the bond in question? He was under a species of duress which left him no volition: *Bac. Abr. Duress; Attorney-general v. Dutrie*, 2 Vern. 497; *Proof v. Hines*, Cas. Temp. Talb. 111; *Gould v. Okeden*, 3 Br. Ch. 560; *Kenrick v. Hudson*, 6 Br. P. C. 614; *Nicholls v. Nicholls*, 1 Atk. 409; *Thornhill v. Evans*, 2 Id. 330. He was compelled to elect between the sacrifice of his whole personal estate and the giving of the security. If the appellants had a right to put him to that election, he must abide by it. But, in my judgment, there must be a lamentable defect in that system of laws which sanctions such proceedings; and, if I do not much deceive myself, I shall be able to vindicate the system, which we have the honor to administer, from so serious an imputation.

The object of McDonald in refusing a postponement of the sale, and demanding specie in payment of the execution, and of the bids which were made, is perfectly apparent upon the face of the transaction. It is not pretended that any apprehension was entertained that the property would have been removed, if the sale had been postponed, or that the security offered was not ample and unquestionable, or that the paper currency of the country was so depreciated or uncertain in value, as to render it unsafe to receive it in payment. But the motives of McDonald are not left to be gathered as a matter of inference. He has boldly avowed them in his answer. "He admits that he did require payment in specie at the sale, with the view of preventing the respondent from obtaining the means to satisfy the said execution, with as much facility as he might, perhaps, otherwise have done, and with the view of making advan-

tageous purchases thereat, in the hope of thereby saving a portion of the large amount justly due him from the said John Neilson, jun. (defendant then and still believing that respondent had fraudulently combined with said John Neilson, jun., to prevent defendant from collecting the same)." It stands, then, admitted upon the case, that the sale was conducted in a rigorous and unusual manner, not for the purpose of obtaining satisfaction of the execution, but of obtaining payment or satisfaction of a debt against a third person.

The question then is, whether, admitting that the sale could not have been impeached, if this fact had not appeared, it is affected by the illegal purpose for which it was made; for, if the sale was, in judgment of law, fair and legal, and vested McDonald with a title to the articles purchased by him, then, undoubtedly, the restoring those articles to the respondent, affords a good consideration for the bond which he gave; but, in my judgment, the sale was fraudulent, and passed no title to any party to the fraud, in any article purchased at the auction. I shall assume, for the present, what I think is incontestably established by the proof, that Griffith and Livingstone, at least, perfectly understood the object of McDonald, and lent themselves to the consummation of his purpose. It presents, then, the case of a combination or conspiracy between the plaintiff in an execution, and the officer who is to execute it, so to conduct the proceedings under it, as to render it difficult, if not impossible, for the defendant with the most abundant means to pay it; and so as to prevent the possibility of competition at the sale, for the avowed purpose of producing a sacrifice of the defendant's property, and enabling the appellants to make advantageous purchases. Can there be a doubt, if the sale had proceeded, and no compromise had taken place, and the respondent had filed his bill for relief, that the chancellor should have set aside the sale as fraudulent, so far as the appellants were the purchasers, and have compelled them, upon receiving the amount of their debt, to restore the property purchased to the respondent, or, if they had parted with it, to pay him its full value?

The case of *Lord Cranstown v. Johnston*, 3 Ves. jun. 170, is a direct authority to this point. In that case, Johnston, having a just debt of two thousand and five hundred pounds against Lord Cranstown, and not being able to obtain satisfaction of it in England, instituted proceedings against him in the isle of St. Christophers, where he had an interest in a valuable estate. He obtained a judgment against Lord Cranstown, under which

he caused his interest in the estate to be sold, and became himself the purchaser through the medium of his agent. The proceedings were admitted to have been in strict conformity to the law of the island, and to have vested in Johnston the legal estate in the property purchased. Lord Cranstown filed his bill for relief against the sale, and prayed a reconveyance of the estate, upon payment of the debt and cost to Johnston. He founded his claim to relief upon several grounds: 1. That when the suit was commenced, he was not personally resident in St. Christophers; was never served with process, nor appeared in the cause; 2. That when the suit was instituted, he was in treaty with the defendant for securing the debt; that notwithstanding the treaty, the defendant directed the proceedings to procure an absolute sale of his estate; that while the proceedings were going on, he declared to several persons that his only object was to obtain security for his debt, and that he would at any time accept principal and interest.

The defendant admitted that there had been a correspondence between him and the complainant, in relation to a settlement, but that instead of being lulled into security by it, he had expressly informed him that he should proceed against his St. Christophers estate; that he has informed the husband of the complainant's mother, that it was in his power to procure an absolute sale of the complainant's estate, and that he should do so, if his debt was not paid; and urged him to become the purchaser, and pay the debt. He explicitly denied having told any one that his only object was to obtain security, and that he would at any time accept principal and interest; that all the proceedings had been in strict conformity to the law of the island. No part of the answer was materially impeached by the proof.

The defendant's correspondence with his agent in St. Christophers constituted a part of the proofs. And from that correspondence it appeared distinctly that the defendant's object was not to obtain payment of, or security for his debt only, but to become the absolute purchaser of the West India estate.

The master of the rolls granted the relief prayed for. He thought the law of St. Christophers, which authorized the sale of an absentee's estate without actual notice of the proceedings, merely by leaving notice at his last place of residence, and posting another upon the door of the court-house, a very unwise and improvident one. But he admitted it to be the law, and that the defendant had a right to proceed under it, and he could

not grant relief upon that ground. He expressed his conviction that Lord Cranstown did not believe that his estate could be absolutely sold; but admits that this circumstance could not affect the defendant. He admits that the denial of the defendant, that he ever said his only object was security, and that he would, at any time, take his principal and interest, must be taken as true, being contradicted only by a single witness; and does not put his relief upon that ground. He places it expressly upon the ground that, from the correspondence between the defendant and his agent, it was apparent that the defendant's object in the sale was, not only to obtain payment of his judgment, but to make an advantageous purchase. His language is this: "Upon the evidence, the case is clear of all doubt as to the transaction, and the object the defendant had in view in getting that judgment: 3 Ves. jun. 179. From the letters of June and September, from the agent, it is clear the object of the defendant was, not only to obtain a sale to satisfy his judgment, but a sale at which he was to be the purchaser, upon such beneficial terms that it would be worth his while to forego other prospects in life, viz.: the settlement referred to in the East Indies. From the letter of the thirteenth of November, from the agent, and the defense, I am to understand that if five shillings had been given, it would be equally competent for him to insist that that should be the price, and that he had as good a right to keep it as he has now. Such a picture of a sale under a judgment so insisted upon, is such as I should not have thought could have been exhibited in a court of justice with a serious intention, supposing that any law of any country should be perverted to such a purpose:" 3 Ves. jun. 180, 181.

Again: It has been argued very sensibly, that it is strange for this court to say the sale is void by the laws of the island or for want of notice. I admit I am bound to say, that according to those laws, a creditor may do this. To that law he has had recourse, and wishes to avail himself of it. The question is, whether an English court will permit such an use to be made of the law of that island, or any other country. It is sold not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt, for which the suit was commenced, and for which only the sale could be holden."

The legality of the sale, if a third person had been the purchaser, is admitted by the master of the rolls, and that no relief

could have been had against him. The act under which the sale took place was the act of 5 Geo. II. ch. 7, which extended to all the English plantations. It was in force here from 1732, till the revolution. The master of the rolls, I admit, lays considerable stress upon the unreasonable provision of the colonial act as to the service of process, and the mode of sale. But it is clear upon the face of the case, that striking out of it the evidence, that Johnston's object in effecting the sale was, not only to obtain payment of his debt, but to purchase the estate, the relief could not and would not have been granted. It was put upon the ground, that his proceedings were a fraud upon the act, inasmuch as his object was to effect a purpose which it did not authorize or contemplate, under color of a proceeding which it did authorize. And does not this principle commend itself to all our feelings of natural justice and equity.

Now can there be any difficulty in the application of this principle? A legal act will always be presumed to have been done for a legal purpose, unless the contrary is made to appear by positive proof, or the strongest circumstantial evidence. Every intendment shall be in favor of the act. But when it does appear to have been done for an illegal purpose, a court of equity will restrict its operation to the object which might legally have been accomplished by it.

The law is full of analogies in support of this principle. Upon what other grounds is an action upon the case sustainable against a sheriff for oppressively and maliciously executing a process? The oppression and the malice in many, if not in most cases, consist in the motive with which an act, legal in itself, is done. Take the case of *Rogers v. Brewster*, 5 Johns. 125, and the cases there cited. The process of the constable authorizes him to take the horse of the plaintiff, as much as any other article of personal property. But the circumstances of the case showed that his motive in taking the horse in preference to any other property, was not to obtain payment of his execution in the most speedy and effectual manner, but to vex and oppress the plaintiff.

I shall not take up the time of the court in showing that the only legal purpose for which the execution in this case could be used, was to obtain satisfaction of the judgment upon which it was issued; nor in a recapitulation of the evidence to show that, instead of being used for the purpose, it was used for the avowed and express purpose of enabling McDonald to purchase the respondent's property at enormous and ruinous sacrifices; and

if I have been successful in showing that the law would not have permitted him to have retained the property, but would have compelled him to restore it, or account for its value to the respondent; it necessarily follows, that the voluntary restoration of that which the law would thus have compelled him to restore, can form no consideration for the bond of the respondent.

But it may be said that if Eddy should not be held to have been a party to the combination, then the purchases made by him were legal, and the restoration of the property formed a portion of the consideration of the bond. The consideration for Eddy's portion was the respondent's note. It did not go into the bond; and if it had, McDonald could not avail himself of it. The judgment and note of John Neilson, jun., and Boyce, who were both notoriously insolvent, it will not be pretended formed a consideration sufficient to sustain the bond, and these are the only legal considerations, beyond the debt due from the respondent, for which it is pretended the bond was given.

In this view of the case, therefore, I should be clearly of opinion that the respondent's bond ought to stand as security only for the amount of McDonald's judgment; and that upon payment of that, it ought to be given up and cancelled.

Nor have I been able to satisfy myself that McDonald has any equitable claim upon the respondent, for which the bond ought to stand as further security. If it were apparent upon the case, that the bond gave McDonald no more than he was equitably entitled to from the respondent, the court would, undoubtedly, direct it to stand, although it might have been improperly obtained, upon the familiar principle, that he who asks for equity shall do equity: 9 Mod. 412; 1 Cas. Ch. 97; *Proof v. Hines*, Cas. Temp. Talb. 111; *Gould v. Okeden*, 3 Br. Ch. Cas. 560; *Kenrick v. Hudson*, 6 Br. P. C. 614; *Thornhill v. Evans*, 2 Atk. 330; *Ld. Cranstown v. Johnstown*, 3 Ves. jun. 170. But then the appellant's equity ought to be perfectly clear and manifest to induce the court to impose terms upon the respondent, in a case circumstanced like this.

I shall not enter into a minute examination of the alleged grounds of the appellant, McDonald's equitable claims against the respondent. They relate to a raft of timber, belonging to the son of the respondent, out of the proceeds of which McDonald alleges he was to have received a portion of his debt against the son, and of which he was deprived through the agency of the respondent; and to a replevin suit for certain

goods and chattels belonging to the son, of which it is alleged the respondent had become fraudulently possessed, and a portion of which still remained in his hands. It is sufficient to say, in relation to these claims, that whatever may be the rights of McDonald, he can assert those rights either at law or in equity; and that they are by no means so clear as to entitle him to call upon the court in this summary and collateral manner to adjust and allow them.

Nor does the arrangement which is alleged to have been made between the respondent and his son, and sanctioned by the family, that the amount agreed to be paid by the father for the son, should be deducted from his inheritance, vary the case. The agreement of the son formed no consideration for that of the father. It was in his power to have deducted it without the consent of his son. He was under no moral or legal obligation to pay the debt, and the agreement to do this was most clearly not voluntary, but extorted from him.

I do not think the evidence sufficient to charge Eddy as a party to the combination. The principal circumstance which gives rise to suspicion against him, is the fact of his attending the sale prepared to pay his bids with specie. This certainly affords some reason for believing that he must have previously known that specie would be required in payment, and have been a party to the whole arrangement; but it is not of sufficient weight to overbalance the positive denial in his answer.

As to the other appellants, the evidence of combination is overwhelming. The testimony of Hunter as to the declaration of Griffith, that he was afraid the respondent would return before the day of sale, and get the proceedings stayed, receives strong and ample confirmation from Griffith's whole subsequent conduct and from all the circumstances in the case. It is the first glimmering we discover of the spirit and object with which the proceedings were conducted, and makes him an accessory before the fact to all the subsequent acts of violence and oppression. It is followed up by an abandonment of all official discretion, and an entire submission to the plaintiffs in the execution. Instead of acting as the minister of the law, and guarding its process against misapplication and abuse, he became the passive instrument of a party in the accomplishment of his illegal purposes. It was contended upon the argument, that he was not bound to incur the hazard of a suspension or adjournment of the sale, and that the law will not inquire into the extent of the hazard. Is it, indeed, true, that the law will

not exercise a supervision or control over the discretionary acts of its ministerial officers? That they are omnipotent and irresponsible in the exercise of the power intrusted to them? "It is a proposition," as was once said by Lord Hardwicke, "too monstrous to be debated."

The law will make the most liberal intendment in favor of its ministerial officers, when acting within the limits of their authority; but it will not permit them to resort to the *ultima ratio*, when the legitimate object, which it is their duty to effect, can be accomplished by milder means. Has a sheriff a right to load an unresisting debtor, who quietly submits to his authority, with bonds and fetters, to guard against an escape in carrying him from his home to a prison? And yet it is the most effectual way of preventing an escape.

It was the duty of Griffith, under the circumstances of this case, to have suspended or adjourned the sale; and his conduct throughout the whole of this transaction, deserves the severest reprehension. It is due to the appellant, McDonald, to say, what is apparent on the face of this case, that he entertained a sincere and strong conviction that the respondent had aided his son in defrauding him out of a large and just demand; and though this belief, unsupported as it is by proof, does not alter the legal, it does most essentially change the moral, character of his conduct.

The only question that remains is as to the competency of Livingston and Griffith as witnesses. No relief is prayed against them. Whether a decree can pass against them, for costs only, seems to be questionable. But, admitting that it may, it is still but a contingent liability. A certain liability for costs is undoubtedly an interest which will render a witness incompetent. But upon the authority of *Man v. Ward*, 2 Atk. 228; *Colton v. Luttrell*, 1 Id. 451; and *Beebe v. The Bank of New York*, 1 Johns. 556, I think these witnesses were competent, and that the objection went merely to their credibility.

I am accordingly of opinion, upon the whole case, that the decree of the chancellor, as it respects the appellant, McDonald, ought to be affirmed, with this modification, that the respondent, in addition to the note and judgment, which he is directed to re-assign and deliver to McDonald, also deliver to him the instrument by which that note and the judgment were assigned to him, the respondent, by McDonald; to the intent that the general release which it contains, on the part of McDonald, of all demands against the respondent, may be can-

celed; and that so much of his honor the chancellor's decree, as relates to the appellant, Seth Eddy, be reversed.

HUNTER, KING, LEFFERTS, LYNDE, MALLORY, OGDEN, STRANAHAN, SUDAM, and THORN, senators, concurred.

SAVAGE, Ch. J. The facts in this case, which appear to me material, are as follows: In the month of September, 1815, McDonald sold goods to the respondent's son, John Neilson, jun., amounting to two thousand and one hundred dollars. On the tenth of March, 1816, J. Neilson, jun., gave a note for seven hundred and eleven dollars and twenty-five cents, and on the fourteenth of the same month another note of one thousand three hundred and ninety-three dollars and eighty-two cents, both payable to Jacob Boyce, or order, in ninety days, and indorsed by Boyce to McDonald. On the sixteenth of the same month, J. Neilson, jun., and McDonald entered into a written contract, by which it was stated that McDonald had bought two hundred and fifty sticks of timber (afterwards estimated at eight hundred dollars, but which really produced but six hundred dollars), to be delivered by J. Neilson, jun., in New York, and then paid for at the New York prices, by being indorsed on McDonald's notes; the balance to be refunded to J. Neilson, jun., if the notes were thus overpaid. The timber was sent to New York by one Samuel Hewit, who proceeded to that place in company with the respondent. When the timber arrived at New York, McDonald demanded it, but the respondent told Hewit he had no right to deliver it. The respondent did not promise to indemnify Hewit against the consequences of non-delivery, but Hewit understood him that he (H.) should not be injured. The respondent said McDonald's debt should be the last his (the respondent's) son should pay. Hewit refused to deliver the timber, and McDonald sued him for it. Hewit gave himself no concern about the suit, the respondent defended it, and McDonald failed in his action, on the ground that the contract between him and J. Neilson, jun., was executory, and did not transfer to McDonald the title in the timber. McDonald sued J. Neilson, jun., on the large note, and obtained a judgment, which was docketed May 15, 1818, and on the nineteenth of June following, *a fi. fa.* thereon was levied upon the personal property of J. Neilson, jun., in his possession, nearly all of which the respondent appeared and claimed, saying he had purchased it at a sheriff's sale, upon an execution in favor of Rockwell and Stebbins. The deputy sheriff who levied, Frank-

lin Livingston, one of the appellants, advertised the property for sale on the eighth of July, 1818, on which day the respondent brought replevin against McDonald and Livingston for a part of the goods, worth about six hundred and one dollars. The value of those included in the declaration in replevin, was only three hundred and sixty-five dollars and thirty-one cents. On the trial, a verdict passed for the defendants in the suit, McDonald and Livingston, on the ground that the purchase by the respondent, under the Rockwell and Stebbin's execution was fraudulent, inasmuch as the respondent had agreed with his son to pay that execution out of the avails of the raft. On this trial it also appeared that the respondent had no previous authority to intermeddle in the disposition of the raft, though his son afterwards approved of his acts. A judgment was entered upon this verdict, and an execution issued for four hundred and eighty dollars and eighty-three cents, under which Griffith, as deputy sheriff, advertised the respondent's personal property for sale on the twenty-second November, 1819, at nine A. M. (Here the chief justice adverted to the proceedings preparatory to and attending the sale, as above stated by Sutherland and Woodworth, JJ.)

The sale was proceeding when the respondent, by the advice of his friends, proposed to compromise with the plaintiff, who offered to take two thousand five hundred dollars in discharge of all his claims against both father and son. This proposal was finally acceded to, and the amount was secured by the bond and mortgage in question, after consultation with his family and friends, among whom an arrangement was made by which the sum secured was to be deducted out of the share which J. Neilson, jun., was to receive from the respondent's property as a son's portion. McDonald, on receiving the bond and mortgage, joined with Livingston in releasing the judgment and execution obtained in the replevin suit. He transferred to the respondent the notes of seven hundred and eleven dollars and twenty-five cents, against J. Neilson, jun., indorsed by Boyce, and assigned his judgment against J. Neilson, jun., and executed a general release of all demands against both the Neilsons. The bond and mortgage were payable in five equal annual installments, with interest. When the first installment became due, McDonald brought a suit upon the bond; and then, and not till then, the respondent filed his bill in the court of chancery for relief. In the meantime J. Neilson, jun., had obtained the discharge of his person under the insolvent act.

There are some other circumstances which I shall notice hereafter.

The question first in order relates to the competency of two of the defendants in the court below (Griffith and Livingston) as witnesses. On the point whether a defendant, who is charged with fraud, but against whom nothing specific is prayed, may be examined as a witness for his co-defendants, the decisions in the English courts are certainly somewhat contradictory; but it seems to me that the weight of the later authorities is in favor of the admissibility: 1 Phil. Ev. (2 Am. ed.) 63; *Fenton v. Hughes*, 7 Ves. 287; *Dunham v. Corporation of Chippenhaus*, 14 Id. 251; *Whitworth v. Davis*, 1 Ves. & B. 548, 551. The inclination, in our courts, has been "to confine the question of interest within strict and precise boundaries, and to let objections go more to the credit than to the competency of witnesses:" *Bebee v. Bank of New York*, 1 Johns. 577, and to admit the testimony of such defendants, permitting all objections to be made to their credibility rather than their competency: *Kirk v. Hodgson*, 1 Johns. Ch. 550. In my judgment the chancellor decided correctly in receiving the testimony of Griffith and Livingston.

The other points which appear to deserve consideration are: 1. The regularity of the proceedings under the execution; 2. The validity of the bond and mortgage; 3. If the proceedings were irregular, whether the relief decreed by the chancellor should be granted under the circumstances of this case?

1. The sheriff must obey his writ. It is his duty, therefore, on a *fi. fa.* to collect the money by the return day. He must not show favor, or give unreasonable delay; neither should he be guilty of oppression, or use more severity than is necessary: *Bac. Abr. Sheriff (N.)*; *Dalt. Sheriff*, 109, 110.

In this case, the execution was delivered to him on the tenth of November, 1819, returnable at the next January term. He levied on the thirteenth of November, and advertised the property for sale on the twenty-second. The respondent was absent when the levy was made, and returned the evening before the sale. On the morning of the twenty-second, he requested a postponement of the sale, to which Griffith answered, he should obey the instructions of McDonald. He requested McDonald to agree to the postponement, which he refused. I incline to credit this statement of facts, rather than the relation J. Neilson, jun. McDonald told the deputy that he

should demand specie of the sheriff, and the deputy then gave notice that he should require it from the purchasers.

It is not at all surprising that McDonald should have been willing to distress the respondent. Smarting under the losses, disappointments and perplexities he had suffered, resulting, as he had supposed, from the wanton and malicious officiousness of the respondent, he, no doubt, felt gratified with the prospect of renumeration and inflicting punishment upon him. The sheriff, however, ought not to lend himself to any one, and thus become the instrument of gratifying the vindictive feelings of an exasperated party. I am rather inclined to believe, that, in this instance, the deputy acted under an impression that he was bound to obey McDonald's instructions. In this, he was mistaken. He was bound to exercise a proper discretion, and when he saw that there must be a great sacrifice of the respondent's property, it was his duty to have postponed the sale: *Tinkom v. Purdy*, 5 Johns. 345. A reasonable time should have been given the respondent to obtain the money, particularly when the sheriff could not possibly sustain any loss from the indulgence.

I cannot, however, believe that there was that combination or concert between the appellants, which is supposed. McDonald and Livingston were parties to the execution, and it would have been strange if there had not been concert between them. Griffith had, several days before, informed a son of the respondent, that he should not postpone the sale without McDonald's direction. He told Hunter that he intended to sell as soon as the law would permit, and was afraid the respondent would return and pay the money. This conversation was voluntary on the part of Griffith, and certainly not calculated to further McDonald's views. The natural consequence of making a public disclosure of what McDonald must have wished to be kept secret, would be to defeat the object, by giving the opposite party notice, and, therefore, enabling him to guard against it, by preparing to pay the money.

The principal circumstance relied on to prove combination on the part of Eddy is, his going to the sale with specie in his pocket, and offering to lend it to the respondent, on condition of his securing him fifty dollars, due to him from J. Neilson, jun. This fact, to my mind, is conclusive evidence of Eddy's innocence. He went to the sale with the expectation of making advantageous bargains, to indemnify himself for a loss sustained, as he alleges, through the respondent's instrumentality.

What inducement can any man have to attend a sheriff's sale or an auction, but to make advantageous purchases? What more natural than a desire to secure a bad debt, under such circumstances? The only feature about Eddy's conduct, which seems extraordinary, is, that he was willing to loan the specie to the respondent on any terms, and it can only be accounted for on the supposition that he was fearful he might not otherwise attain his object. Had the respondent accepted his offer, McDonald's views would have been entirely defeated, and yet this offer is urged as proof of Eddy's combination.

In conducting the sale, the deputy seems to have acted with ordinary indulgence and prudence, but he certainly erred in refusing the postponement. And were this the only question in the cause, I should certainly not hesitate in saying that the sale should be set aside.

2. The sale being considered irregular, it would seem to follow that the bond and mortgage, being a consequence of the sale, must be considered as improperly obtained, and be set aside, either totally or partially. In this case, however, there are considerations which have brought my mind to a different conclusion.

The opinion of his honor, the chancellor, on this point, is in accordance with former decisions; which are, that although the security may have been unduly obtained, yet it shall stand for what was truly due at the time. I can see no reason for limiting this doctrine to such claims as are legally due. Why do parties go into chancery but for obtaining what a court of law cannot give them? The security ought to stand for what in equity and good conscience the party is entitled to receive. "Courts of equity never interfere to deprive the plaintiff at law of any legal advantage which he may have gained, unless the party seeking relief will do complete justice, by paying what is really due. Indeed, they have, upon the same principle, gone so far as to refuse their assistance in relieving against a judgment obtained by fraud." *Payne v. Dudley*, 1 Wash. 199; *Small v. Brackley*, 2 Vern. 602.

The respondent in this case had, by his improper and wanton interference with the raft which McDonald had purchased and paid for, occasioned a loss to him of from six hundred to eight hundred dollars, besides all the costs and expenses which he sustained.

He had again, by a fraudulent purchase of the property of John Neilson, jun., taken out of the possession of McDonald,

property, worth, at least, six hundred dollars, a part of which only was included in the replevin suit. It appears also, that a negotiation had previously been on foot, between the respondent and McDonald, for the sale and purchase of the demands which the latter held against J. Neilson, jun.; and it also appears, that the offer to compromise at the sale, proceeded from the respondent, was entered into by the advice of friends and counsel, and under a full knowledge of his rights: 1 Mad. Ch. 215. It is said, indeed, that he was apprehensive, from McDonald's circumstances, that the property, if taken away, would not be obtained again; but surely there was no ground to apprehend that both the sheriff and his deputy were insolvent. He had his remedy against the officer, as well as against the party. Although I cannot approve the conduct of McDonald or the deputy, yet it is not to be denied that the respondent had provoked the treatment he received. He had deliberately executed the bond and mortgage, under the circumstances just mentioned, and also had, by a family arrangement, placed the amount of the debit to his son, the original debtor.

In the research which I have been able to make, I find no case which goes the length of setting aside a conveyance made under such circumstances. If done at all, it should be on completely indemnifying McDonald for the value of the raft, the goods replevied, and a liberal allowance for the costs and expenses of a three years litigation.

3. This brings me to the consideration of the relief, if any, which should be granted. There is no doubt that the court of chancery has power to grant relief against deeds and judgments, not only when obtained by fraud or imposition, *Reigal v. Wood*, 1 Johns. 406, and cases there cited, but also when regularly obtained, if there are circumstances of extraordinary hardship, or great inadequacy of consideration: *Lord Cranstown v. Johnston*, 3 Ves. jun. 170. The party asking equity must, however, do equity. He must come into court with clean hands, unspotted with the foul stains of fraud and chicanery. In the present instance, the respondent came with an ill grace into a court of equity to ask redress against grievances which were the consequences of his own misconduct. Besides, he slept upon his rights (if any he had), until his son, the original debtor, had obtained a discharge, exempting his person from imprisonment. He had before got possession of all his son's property; and the only remedy which McDonald had to enforce col-

lection of what is admitted to be an honest debt, is now taken away from him. If the bond and mortgage should be canceled at all on any terms, it should only be done partially, allowing so much to remain as would be equal to the equitable claims of McDonald; and also upon restoring him to all the rights which he possessed anterior to the execution of those securities. The latter condition cannot now be complied with. The release to J. Neilson, jun., cannot be canceled without instituting proceedings against him, neither can his exemption from imprisonment be taken from him.

On the whole, therefore, I am of opinion that the bond and mortgage given by the defendant should not be canceled. Although the conduct of McDonald and the deputy cannot be justified, yet, as between the parties in interest, there was a sufficient consideration.

1. Demands are assigned to the respondent amounting nominally, to more than the bond and mortgage; demands which he had previously proposed to purchase at five shillings on the pound. He now gave less than twenty shillings. 2. He was released from all liability to McDonald, which, upon equitable grounds, amounted to from fourteen to sixteen hundred dollars, besides costs and expenses. 3. The respondent's son was released from a debt admitted to be honestly due, amounting to considerably more than the bond and mortgage. 4. The securities were executed to settle a legal controversy. The respondent knew his rights, and that he had a remedy against responsible persons. He had the benefit of counsel, and the advice of his family and friends. 5. And, under all circumstances, the arrangement was reasonable in itself.

My opinion, therefore, is, that the decree of his honor, the chancellor, be reversed.

BOWKER, BOWNE, BRONSON, BURT, CLARK, CRAMER, DUDLEY, EARLL, EASON, GREEN, HATHAWAY, MCINTYRE, REDFIELD, WHEELER and WOOSTER, senators, concurred.

A majority of the court being for a reversal, it was thereupon ordered, adjudged and decreed, that the decree of the court of chancery, made in this cause be reversed; that the respondent's bill be dismissed without costs to either party as against the other; and that the injunction issued in this cause be dissolved, and that the record and proceedings be remitted, etc.

SHERIFF, DILIGENCE REQUIRED OF.—An officer who receives a writ of execution ought, if possible, to have the money by the return day: *People v.*

Ten Eyck, 13 Wend. 451. But he is not entitled to wait until that time before he institutes such proceedings as are essential to producing the satisfaction of the writ. If he refuses to levy, an action may be maintained against him before the return day, if the plaintiff can show that he has been damaged by the refusal: *Shannon v. Commonwealth*, 8 S. & R. 444; *Farquhar v. Dallas*, 20 Tex. 200. The precise degree of diligence required of officers in executing writs of *fieri facias* can not be very definitely described. Whether an officer has proceeded with due diligence is a question which must be submitted to the jury; and different juries may reach adverse conclusions from the same evidence. No doubt sheriffs are bound to use all reasonable endeavors to execute process, to proceed as rapidly as the circumstances of the case will permit, and to prosecute such inquiries as are necessary to enable them to perform their duty intelligently, and if possible, successfully: *Whitsell v. Slater*, 23 Ala. 626; *Lindsay's Ex. v. Armfield*, 3 Hawks, 553; S. C., *post*; *Hinman v. Borden*, 10 Wend. 368; *Kennedy v. Brent*, 6 Cranch, 187; *O'Bannon v. Saunders*, 24 Gratt. 138. If the officer is not requested to proceed at once, and is not warned of the existence of any especial urgency, he will not be deemed guilty of negligence or want of due diligence, because he does not proceed instantaneously, or with the celerity which would be obviously required if he were warned that the occasion was one calling for the utmost promptitude: *Whitney v. Butterfield*, 13 Cal. 338; *Jainier v. Vandever*, 3 Harr. Del. 29; *Roe v. Gemmell*, 1 Hous. Del. 9.

INSTRUCTIONS TO SHERIFF.—The plaintiff is the person who is most interested in the writ of execution; and generally the sheriff should heed his instructions, and permit him to have substantial control of the writ. "He has no right to insist on a fraudulent nor oppressive use of the writ; nor in any respect to compel the officer to exercise a severity which would seem to be actuated by malice towards the defendant as much as by the desire to obtain satisfaction of his judgment. But all the directions of the plaintiff not characterized by fraud, oppression, or undue rigor, must be obeyed, or else the officer will be held responsible to plaintiff for the consequences of his disobedience: *Tucker v. Bradley*, 15 Conn. 46; *Rogers v. McDearmid*, 7 N. H. 506; *Richardson v. Bartley*, 2 B. Mon. 328; *Patton v. Hamner*, 28 Ala. 618; *Poston v. Southern*, 7 B. Mon. 289; *Walworth v. Readboro*, 24 Vt. 252; *Shyrock v. Jones*, 22 Pa. St. 303. The plaintiff may direct that the property of one only of the defendants be levied upon: *Root v. Wagner*, 30 N. Y. 9; *Godfrey v. Gibbons*, 22 Wend. 569; or that the sale be upon credit or for bank notes: *Armstrong v. Garrow*, 6 Cow. 485; *Gorham v. Gale*, Id. 467, note a.; or that the execution of the writ be suspended permanently or temporarily: *Jackson v. Anderson*, 4 Wend. 474; *Morgan v. People*, 59 Ill. 60.

SHERIFF'S AUTHORITY TO ADJOURN SALES.—To prevent the needless sacrifice of property, the officer holding a writ of execution is invested with a very large discretion. In the exercise of this discretion he may, and ought, even against the protest of the plaintiff, to adjourn the sale, or return that the property remains unsold for want of bidders, whenever he sees that his proceeding with the sale will, in all probability, result in a sacrifice greater than that usually following from a forced sale of property of like character: *Reynolds v. Nye*, 1 Freem. Ch. 462; *Keightley v. Birch*, 3 Camp. 321; *Hawley v. Cramer*, 4 Cow. 717; *U. S. v. Drennen*, 1 Hemp. 320; *Jewett v. Guyer*, 38 Vt. 209; *Swortzell v. Martin*, 16 Ia. 519; *Tinkom v. Purdy*, 5 Johns. 345; *Blossom v. R. R. Co.*, 3 Wall. 196; *Freeman on Executions*, sec. 288.

WILSON v. TROUP.

[2 COWEN, 195.]

POWER TO MORTGAGE authorizes the execution of a mortgage with a power of sale, particularly where it is the custom of the country to include such powers in mortgages.

IN CONSTRUING CONTRACTS, the situation of the parties, and the subject of their transactions should be considered.

FAILURE TO RECORD A POWER OF ATTORNEY does not affect its validity as against the person who executed it.

A MORTGAGE is a mere security for the debt.

ASSIGNMENT OF MORTGAGE.—An assignment or conveyance of the mortgagee's interest in the land, is a nullity, unless accompanied by an assignment of the debt.

MORTGAGEE'S RIGHT TO FORECLOSE is not affected by his having made conveyances of parts of the mortgaged premises, except in so far as it precludes him from defeating his own grants or acting in hostility thereto.

MORTGAGOR'S RIGHT TO REDEEM is not prejudiced by any conveyance of the whole or of parts of the mortgaged premises, made by the mortgagee.

POWERS—HOW CONSTRUED.—In considering the extent of a power, the intent of the parties must control. In conformity with this intent, a general power may be limited, or a limited power made general.

THE POWER OF A MORTGAGEE TO SELL is a power coupled with an interest.

CONVEYANCE BY A MORTGAGEE.—If a mortgagee convey any part of the mortgaged premises, and thereafter, on foreclosure, acquire the title thereto, his acquisition operates for the benefit of his prior grantee.

TRUSTEE, A PURCHASE BY can be questioned only by the *cestui que trust*.

APPEAL from the court of chancery. The father of the appellants held an interest in a contract with Charles Williamson, for six thousand acres of land in Steuben and Ontario counties; and on October 6, 1796, gave a power of attorney to Daniel Faulkner to receive from Williamson a conveyance, with warranty, and to sign, seal, deliver and acknowledge a mortgage or mortgages to the amount of the consideration-money remaining due, and to do and perform all things necessary and lawful to obtaining the title and securing the consideration-money. On October 21, 1796, Faulkner received the deed, and executed a bond and mortgage for the balance due. This mortgage contained a power to the mortgagee to sell the land to raise the money due on default of the mortgagor, etc. The mortgage was recorded October 24, 1796, but the power was not.

Williamson assigned the mortgage to Sir William Pultney, who died intestate in 1805, leaving a daughter. She died intestate in 1808, and her real estate descended to Sir John Lowther Johnstone. On the death of Pultney, letters of administration were issued to the respondent, Robert Troup.

From 1806 to May, 1811, Troup, as agent, successively of Sir William Pultney and Johnstone, conveyed parcels of the mortgaged premises to eleven of the other respondents. Subsequently Troup, as administrator of Pultney, advertised the premises for sale, under the power contained in the mortgage, and in April, 1811, sold them to Samuel S. Haight, who purchased at the request of Troup, and at once, for a nominal consideration, conveyed to Johnston and wife. Haight was the attorney who assisted Troup in the foreclosure. He was examined as a witness to impeach the proceedings, and his competency to testify was questioned.

The power of sale was proved by a subscribing witness, before a master of chancery of New York, who went into Pennsylvania and took the proof, November 20, 1809. It was registered December 13, 1809. After the sale, to wit, on June 8, 1812, the power was regularly proved, and on the eleventh of the same month it was duly recorded. Wm. Wilson died intestate in 1813, leaving the appellants as his heirs at law. Since the sale in 1811, Troup, as agent of the Pultney estate, sold different parcels of the mortgaged premises. On September 25, 1820, the appellants filed their bill to redeem, and for an account. They charged, in their bill, unfairness and fraud in conducting the sale under the power. All the other material facts are sufficiently stated in the opinions of the judges. The chancellor dismissed the bill without costs.

H. Bleeker, for the appellants. There was no authority to Faulkner to insert the power of sale in the mortgage; the power of attorney was not legally recorded before the sale under the mortgage; the conveyance by the mortgagee of divers parcels in fee, precluded him from proceeding under the power; the sale was void, not being to collect the money due on the bond; the complainants are entitled to redeem, and they ought, at least, to be allowed to have the purchase price of the tracts sold credited on the mortgage.

Wilson had a perfect title except that it stood as security for a debt. Haight was admissible as a witness. There was no authority to insert the power of sale, because this power was not necessary to a mortgage. The conveyances made by Troup extinguished the power of sale.

The sale was not made in good faith. It was to protect subsequent purchasers, not to raise moneys due.

M. Van Buren, for the respondents. This is an attack upon

the interests of many persons on mere technical grounds. The power to Faulkner was sufficient. The intent of the parties must control the power: Sugden on Powers, 459, 1 Am. Ed. The statute requiring the record of powers of sale is for the benefit of purchasers, only: *Bergen v. Bennet*; Caine's Cas. Err. 17 [2 Am. Dec. 281]. The conveyances made by Troup did not destroy the power.

Sedgwick, in reply. Haight was competent as a witness. He was not acting professionally so as to exclude him: *Wilson v. Rastall*, 4 T. R. 753; *Jackson v. Dominick*, 14 Johns. 443. Faulkner had no authority to insert a power of sale in the mortgage: *Nixon v. Hyserott*, 5 Johns. 58. His power was special, and must be specially pursued: Co. Lit. 113a; *Fenn v. Harrison*, 3 T. R. 757; *Gibson v. Coll*, 7 Johns. 390; *Hawkins v. Kemp*, 3 East, 410; *Wright v. Wakeford*, 4 Taunt. 213; *Doe v. Peach*, 2 M. & S. 576.

WOODWORTH, J. The appellants filed their bill in the court of chancery, to redeem certain lands which William Wilson, by his attorney, Daniel Faulkner, mortgaged to Charles Williamson, on the twenty-first of October, 1796. Several questions are raised as to the right to redeem. It is insisted by the respondents that there was an abandonment by Wilson. In looking into the case I have not discovered any facts that warrant this conclusion. Dugald Cameron testifies, that the lands having been abandoned, Williamson took possession in 1800, treated the property as his own, caused a re-survey to be made, and sold parts to various persons. Wilson informed him he was very much embarrassed in his circumstances. It was the understanding at the land-offices that the mortgage was not to be collected, but the estate was to take back the land—that it had been so considered after Troup succeeded to the agency. This proof is altogether equivocal and unsatisfactory. The subsequent transactions clearly evince that Wilson did not consider his right abandoned, nor did the respondents deem it safe to rest on that ground. The letter of James Reese, dated August 10, 1802, called on Wilson to make payment of the land, or that decisive measures would be taken. The respondent Troup admits that in 1807 he applied to him for a release of the equity of redemption, which he declined unless he received compensation. In 1812, a tender of money due was made and refused. I lay no stress on the circumstance that the original deed was found in the office of the respondents. I

presume it had lain there from the time it was executed. There is no proof that it was ever actually received by Wilson. It is not necessary to dwell on this part of the case. There is no foundation for insisting on the extinguishment of the right to redeem.

It is contended by the appellants that Faulkner, who executed the mortgage, as Wilson's attorney, had no authority to insert a power of sale. The power was general, to seal, deliver, and acknowledge a mortgage to Williamson, thereby ratifying all that his attorney should lawfully do in the premises. Wilson resided in the state of Pennsylvania, and probably may not have been acquainted with the statute remedy of foreclosure. He undoubtedly has a right to insist that the term "mortgage," which is of known and definite signification in the law, cannot be satisfied by substituting another instrument, differing in its legal effect and operation. Had this been done, the case would have fallen within the principles laid down by the appellant's counsel, and supported by authority, that when an attorney is authorized to sell and execute conveyances, he has no power to insert a covenant of seisin, the power to sell not giving a power to warrant the title of the thing sold: 5 Johns. 58; 7 Id. 390; Com. Dig. Attor. c. 11. It does not appear to me that there has been any departure from the power. The insertion of the clause to sell, does not confer on the mortgagee a greater security than was intended. It applies solely to the remedy; it does not impair any right of the mortgagor.

It will be remembered, that by the covenant of Williamson, in 1795, a good and sufficient bond and mortgage were to be given on receiving a conveyance. Cameron says, that two land-offices were established, one at Bath, another at Geneva; that the existence of the offices was well known in Pennsylvania, from whence the first settlers came; that it was the invariable practice to take mortgages with the clause authorizing a sale pursuant to the statute. When Williamson speaks of a mortgage, it must be intended he meant a mortgage in the form used at his offices. This cannot be doubted.

Faulkner must have understood the contract as requiring a mortgage in the usual form. It would be a violation of the presumed intent of the parties to construe it otherwise. When Wilson executed the power to Faulkner, the year after, to carry this covenant into effect, what was intended? A security corresponding with the forms then used and approved. Williamson, under the covenant, had a right to say, the mortgage shall

contain this clause. Such was the understanding between him, Faulkner, Hall and Freeland.

It is well settled, that in the construction of all contracts, the situation of the parties, and the subject-matter of their transactions may be taken into consideration, in determining the meaning of any particular sentence or provision. Extraneous evidence is admissible, so far as to ascertain the circumstances under which the writing was made, and the subject-matter to be regulated by it: *Sumner v. Williams*, 8 Mass. 214; *Finole v. Bigelow*, 10 Id. 384; *Whallon v. Kaufman*, 19 Johns. 104. Apply these principles to the case before us, and it cannot be well questioned that a mortgage, with a clause authorizing a sale under the statute, was no more than a fair compliance with the covenant. If this be correct, I think it follows that Wilson, afterwards acquiring an interest in the contract, and coming forward to fulfill it, cannot vary the terms. He could not require a deed, unless the mortgage offered satisfied the intent of the original contracting parties. When he uses the same terms as in the previous covenant, they must be understood in the same manner.

It is further objected, that the power of attorney was not legally recorded, before the conveyance for the sale was executed. The power was first proved before Waterhouse, a master in chancery, in 1809. He was employed to go to Pennsylvania to take the acknowledgment. This is, I think, *prima facie* evidence that it was taken without this state. But it was afterwards proved and recorded, in 1812, subsequent to the deed of conveyance given on the sale, and the question is, whether it lies with the mortgagor to raise the objection. The sale is not affected, although the power has not been recorded. This provision is manifestly for the protection of the purchaser; it must be indifferent to the mortgagor. He has no interest to be affected by it, and cannot object. In the case of *Bergen and others v. Bennet*, 1 Caines' Cas. in Err. 17, Kent, Justice, in delivering the opinion of the court, says: "The omission to record the power will not affect the sale; that it does not lie with the mortgagor to object to the validity of the sale by reason of that omission." This, however, was not the point then before the court. The question was, in that case, whether recording the power in the book of mortgages would satisfy the words of the act, which requires it to be recorded as deeds and conveyances usually are. Although the authority cited

may be regarded as an *obiter dictum*, I am inclined to think it a correct exposition of the statute.

The next objection against the validity of the sale is, that the mortgagee having conveyed parts of the mortgaged premises in fee-simple with warranty, cannot proceed to sell under the power. If I rightly understand the force of this objection, it is, that the mortgagee, having released and conveyed a part of the land, cannot solely, without noticing the rights of the persons to whom he has conveyed a part, foreclose the mortgage. To say that a mortgage could not be foreclosed, by making all parties in interest parties to the foreclosure, would be a proposition altogether untenable. I will, therefore, inquire whether it was not competent for Troup, as administrator, in his own name solely, to advertise and sell. The power authorizes the mortgagee, his heirs, executors, administrators and assignees, to sell the premises at public auction. A statute foreclosure is equivalent to a foreclosure and sale under a decree of a court of equity, and cannot be defeated to the prejudice of a *bona fide* purchaser, in favor of a person claiming redemption in equity: *Jackson v. Henry*, 10 Johns. 185 [6 Am. Dec. 238]. It is undoubtedly necessary that all parties in interest unite: 1 Brown's Ch. 368; 2 Pow. on Mort. 285. But it is an interest in the mortgage that is intended. If the mortgagee, under a mistaken notion that he is absolute owner, grants and conveys the lands mortgaged, in fee with warranty, the purchaser does not come in as assignee of the mortgage; his purchase has no reference to it, and consequently he is not entitled to be made a party in a bill to foreclose. His title is taken subject to the mortgage, and liable to be defeated if the premises are redeemed. If the mortgagee is the purchaser at the sale, then his previous grantee would be protected on the ground of estoppel, as the mortgagee could not claim in opposition to his deed: 12 Johns. 201; 13 Id. 316; 14 Id. 193; 1 Johns. Cas. 81. In point of fact, it never was intended that the grantees of Troup should take as assignees. The mortgage was entirely out of the question, in the view of the parties. The mortgagor, notwithstanding the mortgage, is deemed seised, and is the legal owner of the land, as to all persons except the mortgagee and his representatives. *Hitchcock v. Harrington*, 6 John. 290 [5 Am. Dec. 229].

In *Runyan v. Mersereau*, 11 Johns. 534 [6 Am. Dec. 393], it was held that at law and in equity a mortgage is a mere security for money. The mortgagee has but a chattel interest, which will pass by delivery without writing. In *Jackson v. Curtis*, 19

Johns. 325, it was held that the mortgage is a mere incident to the bond, as personal security for the debt; and that an assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity. This case fully proves that conveying parts of the mortgaged premises can have no effect upon the mortgage; because, had it been an assignment in form, nothing would pass; for the debt due on the bond, to which the mortgage is incident, was left untouched.

From this examination I am satisfied it is not competent for the appellants to object that a part of the land had been conveyed previous to the sale. If the grantees from Troup had acquired an interest in the mortgage, then, indeed, I apprehend the objection would have been well taken. It then would appear that all the persons interested in the mortgage had not joined in the notice of sale. The act contemplates that the notice be given and the sale made by the mortgagee or others thereunto authorized. If the mortgagee has assigned all his interest, notice must be given by the assignee. If a part of the bond and mortgage is assigned, the mortgage and such assignees are the proper parties. I think it follows that if a mortgagee solely undertakes to give notice and sell, when other persons are interested as assignees, the regularity of such proceedings cannot be supported. The objection here falls to the ground; for Troup, as administrator, was exclusively the representative of the mortgagees, who alone held the interest in the security. I concur in the opinion of the chancellor in saying that the sales by the mortgagee could not, upon any reasonable principle deprive him of the right of foreclosing the mortgage; nor could they prejudice the right of the mortgagor to redeem. They created of themselves no obstacle to the right of redemption. If the mortgagor was entitled to redeem, he could recover the possession, as against those purchasers, equally as well as he could recover it against the mortgagee himself. In the view I have taken, it becomes unnecessary to discuss the question whether the disclosure by Haight ought to be considered confidential as between attorney and client.

My opinion is, that the decree of the chancellor be affirmed.

SUTHERLAND, J. The question presented by this case is, whether the equity of redemption of the mortgagor has been legally foreclosed. It is contended, on the part of the appellants, that the foreclosure is illegal, on the following grounds: 1. That Faulkner, who executed the mortgage, as Wilson's attorney, had no

authority to insert a power of sale under the statute; 2. That Faulkner's power of attorney was not legally recorded before the sale under the mortgage; 3. That the mortgagee, or his assignees, having sold and conveyed parts of the mortgaged premises, in fee-simple with warranty, before the foreclosure, could not, subsequently, foreclose and sell under the power; 4. That the sale was not made for the purpose of collecting the money due on the bond, and was, therefore, void; and that the purchase was made by Troup, as trustee, and not mortgagee. I shall very briefly consider each of these objections in its order.

1. The power of attorney from Wilson to Faulkner, empowered him to receive a deed from Williamson, for the land purchased, and to sign, seal, deliver and acknowledge to the said Williamson, a mortgage or mortgages of said land, together with a bond or bonds, for the consideration-money, and to do and perform all things necessary and lawful to the obtaining a title to the said land, and securing the consideration-money therefor, to the said Williamson.

That a mortgage may be made, without containing a power to the mortgagee to sell in default of payment, there is no doubt. Such power is not usually contained in English mortgages; and they have no statutory provision regulating sales in pursuance of them. If, then, it be a just rule of construction, as applicable to powers of attorney, that no authority is to be deemed to pass by them, but such as the terms necessarily import in their most restricted legal sense, it would, perhaps, follow that an authority to mortgage would not authorize the sanction of a power to sell.

But I apprehend such is not the rule of construction by which powers are tested. Sugden on Powers, 459, lays down the rule thus: "In considering the extent of a power, the intention of the parties must be the guide. Thus, on the one hand, a power limited in terms, has, in favor of the intention, been deemed a general power, whilst on the other hand, a general power, in terms, has been cut down to a particular purpose." And this position is fully supported by the authorities. Thus, in *Hinchinbroke v. Seymour*, 1 Br. Ch. C. 395, there was a power in a settlement to raise a portion for a younger child, at such time as the father should direct. He directed it to be raised when she was fourteen years of age; and she dying, he files the bill for it as her administrator. The lord chancellor says: "The raising of a charge for children is, that it shall take place when it shall be wanted. It is contrary to the nature of such

a charge, to have it raised before that time; and, although the power is, in this case, to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own life, if it should be necessary. It would have been very proper so to do, upon the daughter's marriage, or for several other purposes; but this is against the nature of the power." In *Tunkerville v. Coke*, Mose. 146, it was held that a power should be so construed as to effectuate the intention of the parties. There an act had been done which the terms of the power authorized, but which was evidently against the intention of the donor. In *Morris v. Preston*, 7 Ves. jun. 547, a provision in case of the death of a trustee, for the substitution of another, and a conveyance by the survivor, so that he and the new trustee should be jointly interested in the trust, was, by the concession of counsel, admitted to be satisfied by the substitution of two trustees, after the death of both the former, against the express terms of the power; because it was the evident intention of the power that new trustees should be appointed whenever circumstances might require it. In *Ren v. Bulkeley*, Doug. 292, Lord Mansfield says; "The creation, execution and destruction of powers depend on the substantial intention and purpose of the parties:" *Briston v. Warde*, 2 Ves. jun. 336; *Talbot v. Tipper*, Skin. 427; *Mildmay's case*, 1 Co. 175 a.; *Liefe v. Saltingstone*, 1 Mod. 189; 1 Freem. 149, 163, 176, S. C., all establish the same doctrine. It is also illustrated and confirmed by the case cited by the chancellor of *Roberts v. Dixall*, 2 Eq. Cas. Ab. 668, and *Long v. Long*, 5 Ves. 445, which, as he has well observed, "show the liberal construction given to powers in equity, in furtherance of the end for which they were created."

In construing a power of attorney, therefore, in order to ascertain whether it has been well executed, the letter of the instrument is not to be exclusively regarded; but the important inquiry is, have the intentions of the parties been carried into effect.

Now, I cannot entertain a doubt, from the circumstances of this case, that Wilson used the term "mortgage," in the power of attorney, in its popular and customary sense in this country; that is, as descriptive of an instrument containing not only a conditional conveyance of the land, but also a power to sell in default of payment. There is nothing on the face of the instrument evincing a contrary intention. There is no peculiar caution manifested on the part of Wilson in the delegation of

power to his attorney, from which it can be inferred that he intended the terms employed by him should receive the most rigid construction of which they were susceptible. On the contrary, the language used is general and comprehensive. He empowers him to give one or more mortgages, to do all things necessary and lawful to obtain a title to the land, and to secure the consideration-money to Williamson. Faulkner and his associates, who originally contracted for this land with Williamson, must be supposed to have known and understood that the securities always required by the Pultney estate were mortgages containing powers to sell, and that the mortgage, which they were bound to give, was of that description. The contract was made in this state, and to be executed here where hardly any other kind of mortgage was in use. Wilson was the assignee of one of those associates, entitled to all his rights, and subject to all his responsibilities under the contract with Williamson. If, then, the original associates were bound to give a mortgage containing a power of sale, which, I apprehend, cannot be questioned, Wilson, as the assignee of one of them, could not have compelled Williamson to give him a deed without tendering such a mortgage. If not, then the authority to insert such a power in the mortgage was given to the attorney by the general terms, conferring upon him "power and authority to do and perform all things necessary and lawful to obtain a deed." Without such a clause in the mortgage, no deed would have been given. It was, then, necessary to insert it.

I am, therefore, of opinion, upon the first point, that the attorney, Faulkner, had authority to insert in the mortgage a power of sale under the statute, and that the foreclosure is not to be impeached on that ground.

2. I know of no necessity for recording the power of attorney at all, unless it be true, as a general proposition, that whenever the law requires an instrument to be registered or recorded, if that instrument is executed by attorney, the power of attorney must be recorded also, which was not contended for upon the argument, and, I apprehend, cannot be maintained.

The power to the mortgagee to sell, contained in the mortgage, must be recorded, before the deed to the purchaser, under the power, be executed; but that is for the benefit of the purchaser only, to perpetuate the evidence of the authority by which the sale was made, and the mortgagor cannot impeach the sale if the power is not recorded: 1 Caine's Cas. in Err.

Admitting, therefore, that there was the same necessity by

law for recording the power of attorney to Faulkner, that there was for recording this power to sell, the mortgagor could not avail himself of the omission to record it. The execution of the power of attorney is admitted by the appellants, and the objection is not to the proof of the execution. The sale, therefore, is not to be impeached on this ground; but—

3. It is contended that by the sales of portions of the mortgaged premises by Troup, before the foreclosure, the power to sell, contained in the mortgage, was either extinguished or passed to his grantees; that the sale, therefore, under the mortgage, was without authority.

The power of the mortgagee to sell the mortgaged premises, is, undoubtedly, a power coupled with an interest: *Bergen v. Bennett*, 1 Caine's Cas. in Err. 15. And it may, perhaps, be conceded, that it is a power *appendant* or *annexed* to the estate, and not a *power in gross*. These powers are thus distinguished by Hargrave and Butler, in their notes to Coke upon Littleton, note 298 to Co. Lit. 342 b. The former, that is, a power *appendant*, "is where a person has an estate in the land, and the estate to be created by the power is to (or may) take effect in possession, during the continuance of the estate to which the power is annexed, as a power to tenant for life in possession, to make leases. A power *in gross* is, where the person to whom it is given has an estate in the land, but the estate to be created under or by virtue of the power, is not to take effect till after the determination of the estate to which it relates."

Now, the power of the mortgagee to sell, is a power to create or acquire to himself the equitable estate in the land, during the continuance of the legal estate conveyed to him by the mortgage. It seems, then, more properly to fall within the description of powers annexed to the estate, than any other; and the question is, as to the effect of a conveyance of a part of the estate to which the power is annexed, (before the power is executed) upon the power itself.

A conveyance by the mortgagee of his whole estate would undoubtedly pass, and not extinguish the power. This is the common case of an assignment. The assignee takes not only the legal estate, but all the remedies or powers attached to it. But the conveyance of a portion of the estate, will not, in law, carry with it a corresponding portion of the power, because this is in its nature indivisible. It can operate but once, and then is exhausted. The effect, then, of a conveyance of a part

of the mortgaged premises by the mortgagee, I apprehend to be this: It produces a suspension of the exercise of the power as to the part conveyed, in hostility to the rights of the grantee; that is, the grantee shall not defeat his own grant. But the operation of a suspension of the power, whether it applies to the whole or a portion of the estate, is merely to postpone the vesting of the estate, or interest created by, or acquired under the power in possession. It does not suspend or affect the right to execute the power, and perfect the title to the estate. But the possession of the estate, the right to which has been acquired by the execution of the power, shall be suspended or kept from the donee of this power, so far as his previous acts render it just and equitable that it should. This principle is clearly recognized by Sugden in his *Treatise on Powers*, 52, and supported by several cases: *Snape v. Turton*, Cro. Car. 472; *Goodright v. Cator*, Doug. 447.

The principle is familiarly this: A mortgagee in possession leases a portion of the mortgaged premises for a year. At the end of six months, he sells the whole of the premises under his power, and becomes himself the purchaser. The power is well executed, and vests the equity of redemption in the whole of the premises in the mortgagee, subject, however, to all the rights of his lessee. So far as the possession of the estate, or interest acquired under the power, is inconsistent with his lease, it shall be suspended, but shall take effect as to the residue.

The sale by Col. Troup, therefore, of portions of the mortgaged premises, neither extinguished nor suspended his right to foreclose the equity of redemption. Having become the purchaser under the power, his possession shall be suspended, so far as it is inconsistent with his previous grant; and his grant having been in fee, he can never claim anything under the power in relation to the lands granted.

His purchase, therefore, shall inure to the benefit of his grantees—"For, if a man sell land which is not his, and afterwards purchase it, he shall be bound by his deed, and not be permitted to aver he had nothing:" *Jackson v. Bull*, 1 Johns. Cas. 90; *Ischam v. Morrice*, Cro. Car. 110; *Ren v. Bulkeley*, Doug. 291.

The sales by the mortgagee did not in the least affect the rights of the mortgagor. The mortgage was, at that time, valid and subsisting; the sales were subject to it, and the mortgagor, upon redeeming, could have turned the purchasers out of possession, as well as the mortgagee himself.

I am, therefore, of opinion, on this point also, that the foreclosure is not to be impeached. Nor is there any force in the objection, that the Pultney estate had no right to purchase at the mortgage sale, after having sold portions of the mortgaged premises. That they still continued to be mortgagees, necessarily results from what has already been said; but whether they were so or not, is perfectly immaterial. The tenth section of the act concerning mortgages, 1 R. L. 375, provides "that no title to mortgaged premises, derived from any sale made in virtue of a special power, shall be questioned, impeached, or defeated, either at law or in equity, by reason that the mortgaged premises were purchased in by the mortgagee, or his or her assignee, or assignees, or for his, her or their benefit or account." I have already shown that the purchase by Colonel Troup inured to the benefit of the grantees of the mortgagee, so far as it was hostile to those grants. So far as they had any interest in the mortgaged premises, they may be considered as assignees of the mortgagee, and the purchase by him was for their benefit and account; and admitting he was trustee for them, a trustee has undoubtedly a right to purchase, not for his own benefit, but as the agent and for the benefit of the *cestui que trust*. No one but the *cestui que trust* has a right to call in question, or set aside a purchase made by the trustee: *Davoue v. Fanning*, 2 Johns. Ch. Rep. 252. The mortgagor cannot say that the mortgagee was trustee for him, with respect to the surplus which might be produced by the sale, and that he, therefore, is one of the *cestuis que trust*, and has a right to question the purchase by the trustee. He purchased, either as mortgagee, or for the benefit and account of the assignees of the mortgagee, or in neither of those characters. If in either of them, the statute authorizes the purchase. If in neither, then he was not trustee, and had the same right to purchase as any other individual.

But the truth is, Troup was mortgagee, and the proceedings were properly conducted in his name, and could have been in the name of no other person. The mortgage never was assigned. If it had been, it might have been necessary for the assignees to have united in the proceeding under the statute. Though if this should be omitted, it might well be questioned, whether the mortgagor could be received to object. The power, in default of paying the money, authorizes the mortgagee, or his assignees, to sell or convey the premises; and it would seem in point of form, to be well executed by the mortgagee, whether

he retained the interest of the mortgage or not. The right of the mortgagor could, in no manner, be varied or affected by it. The proceedings under the statute is not a suit to which a defense can be made. However, it is unnecessary to express any opinion upon this point, because there never was an assignment of the mortgage; and admitting that the assignee of a mortgage ought to be a party to the foreclosure, it can hardly be contended, that any person who may have an equitable interest under the mortgage, must be made a party.

I am of opinion, therefore, that the sale of the mortgaged premises is not to be impeached on any of the grounds taken by the appellant's counsel, and that the equity of redemption has been legally foreclosed. The conclusion to which I have come upon this view of the case, renders it unnecessary for me to consider the question of abandonment.

Upon the question of fraud, I shall content myself with saying that the case affords no color for the imputation. Colonel Troup, when he entered upon the agency of the Pultney estate in 1801, received the quiet and peaceable possession of the lands in question, together with the other lands belonging to the estate. No act of ownership had ever been exercised over it by the mortgagor. It had been treated and considered by Williamson, who preceded Colonel Troup in the agency, and who made the sale to Wilson, as unincumbered land, and portions of it had been sold by him. Nothing had been paid by Wilson upon the mortgage, nor any effort made to redeem. The deed from Williamson to Wilson was found upon the files of the agency. These circumstances certainly justified the belief which existed in the office, that the purchase had been abandoned by Wilson; and Colonel Troup, acting under that impression, sold and conveyed, in fee, portions of the mortgaged premises as he asserts, and as the facts clearly show, in the purest good faith. Deeming it, however, prudent to have his title made technically correct, he applied to Wilson in 1807, for a release of his equity of redemption, which was refused, unless Colonel Troup would make him some compensation for it, which he declined doing. This application of Colonel Troup was not succeeded by any offer on the part of Wilson to redeem; nor did he ever offer to redeem before the foreclosure. A flourishing village has grown up on that portion of the premises, which has been sold by Colonel Troup. I have not been able to find, in these circumstances, anything to impeach the fairness of the respondent's conduct, or to entitle the appellants to the peculiar favor of a

court of equity. I am accordingly of opinion, that the decree of his honor, the chancellor, should be affirmed.

Savage, C. J. (after stating the facts): The question first in order is, whether Faulkner was authorized to execute the mortgage. If not, there is an end of the controversy. By the power of attorney, he was expressly "to sign, seal, deliver and acknowledge a mortgage, etc., to the amount of the consideration-money remaining due." Now, the consideration-money remaining due was the whole sum for which the lands were sold, one dollar and fifty cents per acre and the value of the mills. It is not denied that the mortgage is for the true sum; but it is contended, that the power to sell constitutes no part of the mortgage, and is, therefore, not within the terms of the power given to Faulkner. Although the instrument without the power of sale would still be a mortgage, yet the fair and common acceptance of the term mortgage, undoubtedly is the instrument as usually drawn, and in common use as a mortgage, when the power of Faulkner was to be executed. The invariable practice of the Pultney land-office and of the whole community, at least in the state of New York, was to incorporate the power to sell. Our statute supposed such a power, and W. Wilson must have intended to give a mortgage in the usual form, and granting the usual remedies. Hence the power of attorney adds these words: "To do and perform all things necessary and lawful to obtaining to me and for my use, a title to the aforesaid six hundred acres of land, and securing the consideration-money therefor to the aforesaid Charles Williamson." I have no hesitation in saying that Faulkner was authorized to execute the mortgage with the power to sell, which it contained.

2. Although the presumption is strong that the purchase was abandoned before the year 1800, and the agents of the estate proceeded upon that ground in selling parcels of the premises, yet there is no evidence of such abandonment, but what is deducible from the acts of the agents, and the acquiescence of Wilson; but as notice of those acts is not brought home to him, he ought not to be prejudiced by them. Besides, if there was an abandonment, it appears to have been waived by the subsequent application made by Troup to Wilson, for a release of the equity of redemption.

3. In my judgment, therefore, the rights of the parties must rest on the regularity of the foreclosure. To this it is objected, that the power of attorney from Wilson to Faulkner was not recorded according to the provisions of the act con-

cerning mortgages; 1 R. L. 372. The answer given to this objection is, that the power was actually recorded, before the sale; that this being considered irregular, as the proof upon which it was recorded had been taken out of the state, it was afterwards regularly proved, and again recorded. The same difficulties are raised as to the power of sale. Although the recording was after the sale, there can be no doubt that it is sufficient to sustain the previous proceeding. The question as to the latter power I consider settled by this court, in: *Bergen v. Bennet*, 1 Cai. Cas. 17 [2 Am. Dec. 281]. It was there decided, that the omission to record the power will not affect the proceedings as between mortgagor and mortgagee. The recording is for the benefit of the purchaser, to protect him against other purchasers or creditors; but the objection cannot be made by the mortgagor.

I concur in the result of the opinions delivered, that the circumstance of Troup's having conveyed a portion of the mortgaged premises did not divest him of the power to foreclose, as the administrator of Sir William Pultney.

In the view which I have taken of this controversy, it does not become important to express an opinion as to the competency of S. S. Haight's testimony. I have, however, no doubt that the communications made to him by Troup, in relation to the foreclosure, are to be regarded as confidential communications between attorney and client, and that the chancellor was correct in suppressing them.

On the whole case, therefore, I am of opinion that the decree of his honor the chancellor be affirmed.

The court being unanimously of this opinion, it was, thereupon, ordered, adjudged and decreed, that the decree of the court of chancery be affirmed, with costs to be taxed; and that the record, etc.

POWER OF SALE IN MORTGAGE.—The point most relied upon in the principal case for the reversal of the decree was, that a power to execute a mortgage did not include the authority to insert in the mortgage a power of sale in case of default. "A power to mortgage given in general terms, without specifying the provisions the deed shall contain, includes the power to make it in the form, and with the provisions customarily used in the state or country where the land is situated." *Jones on Mortgages*, sec. 129. In England a power of sale is usually inserted, and a mortgage without such a power is regarded as so defective, that difficulty would be experienced in finding any person who would be willing to accept it, and advance money upon it. In that country, therefore, a general power to make a mortgage unquestionably authorizes the insertion in it of a power of sale: *Jones on Mortgages*, sec. 1766, citing *In re Chauver's Will*, L. R. 8 Eq. 569; *Bridges*

v. *Longman*, 24 Beav. 27; *Selby v. Cooling*, 23 Id. 418; *Russell v. Plaice*, 18 Id. 21; *Cook v. Dawson*, 29 Id. 123, 128; *Earl Vane v. Regden*, L. R. 5 Ch. 663; *Cruikshank v. Duffin*, L. R. 13 Eq. 555, 560; *Leigh v. Lloyd*, 35 Beav. 455. In the United States, the question seems not to have been determined or discussed, save in the principal case.

MORTGAGE A MERE SECURITY.—In many of the states, a mortgage is by statute declared to be a mere lien, not affecting the property otherwise than by imposing a charge upon it. But independent of these statutes, mortgages are, for most purposes, treated as mere securities, as being mere chattels; as giving the mortgagee no legal estate, no power to convey any part of the premises, nor to maintain ejectment therefor. On this point the principal case has been very frequently cited and followed: *Lane v. Shears*, 1 Wend. 437; *Calkins v. Calkins*, 3 Barb. 312; *Southworth v. Van Pelt*, 3 Id. 349; *Fort v. Burch*, 6 Id. 76; *Merritt v. Bartholick*, 34 How. Pr. 130; S. C., 36 N. Y. 45; *Wheeler v. Morris*, 2 Bosw. 529; *Munro v. Merchant*, 26 Barb. 406; *Edwards v. Farmers' Fire Ins. Co.*, 21 Wend. 485. In *Beall v. Harwood*, 2 H. & J. 167 [3 Am. Dec. 532], the court held that a mortgagor could not maintain ejectment. But this case is against the current of authority. A mortgagor may maintain ejectment or trespass *quare clausum fregit*: *Jackson v. Bronson*, 19 Johns. 325; *Runyan v. Mercereau*, 11 Id. 534 [6 Am. Dec. 393]; *Carter v. Bennett*, 4 Fla. 283; *Johnson v. Cornett*, 29 Ind. 59; *Doe v. McLoskey*, 1 Ala. 708. Except as against the mortgagee, the mortgagor is deemed seised of the freehold: *Hitchcock v. Harrington*, 6 Johns. 290 [5 Am. Dec. 229, and note]. In *Vose v. Handy*, 11 Am. Dec. 101, it was held that the mortgagee was seised of the premises, and, therefore, that the mortgage could not be assigned, except by deed.

CONVEYANCE BY MORTGAGOR.—If the mortgagor retains the legal estate, and the mortgagee holds a mere chattel interest, it must follow that a conveyance by the latter, not accompanied by a transfer of the debt secured, is a mere nullity. This conclusion is maintained by the principal case and by *Swan v. Yaple*, 35 Ia. 248; *Carter v. Bennett*, 4 Fla. 283; *Johnson v. Cornett*, 29 Ind. 59; *Doe v. McLoskey*, 1 Ala. 708; *Varick v. Edwards*, Hoff. Ch. 407; *Cooper v. Newland*, 17 Abb. Pr. 344; *Merrett v. Bartholick*, 36 N. Y. 45; *Jackson v. Bunson*, 19 Johns. 325; *Ellison v. Daniels*, 11 N. H. 274. In the case last cited the court say: "The right of the mortgagee to have his interest treated as real estate, extends to, and ceases at, the point where it ceases to be necessary to enable him to protect and to avail himself of his just rights intended to be secured to him by the mortgage. To enable the mortgagee to sell and convey his estate, is not one of the purposes for which his interest is to be treated as real estate. There is no necessity that it should be so treated for that purpose. That can be equally well effected in the usual way of assigning and transferring the debt secured by the mortgage. The mortgagee is secured and fortified in all his rights, without the adoption of any such principle, and the plain purposes of the mortgage forbid it. The object of the mortgage is the security of the debt; and it is obvious reason that he only who controls the debt should control the mortgage interest." The court then proceeded to consider whether the deed of the mortgagee operated to transfer the mortgage debt, and on the authority of *Aymar v. Bill*, 5 Johns. Ch. 570, and *Bell v. Morse*, 6 N. H. 205, determined this question in the negative.

If the mortgagee has possession by virtue of his mortgage, or is entitled to take possession for condition broken, his conveyance may not be a nullity, but may confer on his grantee a right of possession: *Pickett v. Jones*, 63 Mo. 195; *Welsh v. Phillips*, 54 Ala. 309. As between the mortgagee and his grant-

era, the conveyance may also be effective, at least so far as to estop him from asserting against them a title subsequently acquired by foreclosing the mortgage: *Davis v. Duffie*, 18 Abb. Pr. 365. This is certainly true when the deed contains covenants of general warranty: *Ruggles v. Barton*, 13 Gray, 506; *Lawrence v. Stratton*, 6 Cush. 163, 169.

The principal case has been cited approvingly to show, that extrinsic evidence is admissible to aid in the interpretation of written instruments: *French v. Carhart*, 1 N. Y. 102; that a statutory authority must be strictly pursued: *Voorhees v. Presbyterian Church*, 8 Barb. 149; 5 How. Pr. 72; that the purchase of the trust estate by the trustee is valid except against the *cestui que trust*: *Olcott v. Tioga R. R. Co.*, 27 N. Y. 567; that the intent of the parties is to be taken into consideration in construing a power of attorney: *Hutchings v. Baldwin*, 7 Bosw. 242; *Flagg v. Munger*, 9 N. Y. 488; and that parol evidence may be admitted to show that a deed absolute on its face was intended as a mortgage: *Bank of Niagara v. Johnson*, 8 Wend. 645.

JAMES v. MOREY.

[2 COWEN, 246.]

MERGER.—When a greater and a less estate meet in the same person, without any intermediate estate, the less at once merges into the greater. This rule at law is inflexible.

MERGER, IN EQUITY.—The doctrine of the merger of estates is not favored in equity; and where two or more rights or estates are united in one person, equity will keep them distinct, if from the intention of the party, express or implied, he wishes them so kept.

ELECTION TO TREAT AN ESTATE AS MERGED.—If a person holding both the mortgage and the equity of redemption makes a conveyance in fee, this is an election to treat the mortgage as merged.

RECORDING AN INSTRUMENT not entitled to be recorded does not give notice.

ASSIGNEE OF MORTGAGE, if the assignment is made without the privity of the mortgagor, holds subject to the right of the latter to an account with the mortgagee, but not subject to equities existing against the mortgagee in favor of third persons.

NOTICE OF ASSIGNMENT of mortgage should be given to the mortgagor, or payments made by him to the mortgagee must be allowed, but no notice need be given to subsequent assignees.

A PURCHASER in equity is one who, without fraud and for value, acquires a right or interest.

JUDGMENT BY CONFESSION, entered without the statement and specification required by statute, is fraudulent as against *bona fide* purchasers and judgment-creditors, though they have notice of it.

MORTGAGE, WHAT SECURED BY.—A mortgage does not stand as security for a general balance due the mortgagee, nor for other claims not embraced in the mortgage.

MORTGAGES FOR FUTURE ADVANCES are valid.

POSSESSION AS NOTICE OF TITLE.—One who purchases an estate knowing it to be in the possession of tenants, is bound to inquire what estates they hold.

MERGER, PRESUMED INTENTION.—Although there is no evidence of the intention of a party, or though he is a lunatic, and incapable of forming an intent, the court will presume him to intend that there shall be no merger, if a merger is contrary to his interests.

MERGER, WHEN PARTY MAY ELECT.—When the legal and equitable estates unite in one person, he has a reasonable time to elect whether he will treat them as separate or merged.

A **MORTGAGEE** is not entitled to protection as a purchaser.

RECORDING OF AN ABSOLUTE DEED, when intended as a mortgage, must be in the book of mortgages, or it will not impart notice.

APPEAL from a decree of the court of chancery in favor of Johnson and Morey, against whom James had filed his bill.

J. V. Henry and T. A. Emmet, for the appellant. It is the established doctrine of equity to extinguish or preserve a charge, according to the actual or presumed intention and interests of the person in whom the estates are united, and never to hold a charge as merged, but where it is perfectly indifferent to such party, whether the charge should or should not subsist: 1 Cruise Dig., tit. 8, ch. 2, sec. 32; *Powell v. Morgan*, 2 Vern. 90; *Awdley v. Awdley*, Id. 193; *Thomas v. Kemish*, Id. 348; *Lawrence v. Blatchford*, Id. 457; 15 Vin. Ab., Merger, A.; *Phillips v. Phillips*, 1 P. Wms. 41; 2 Fonb. Eq. ch. 6, sec. 8; *Lord Compton v. Osenden*, 4 Br. Ch. R. 397. One who has actual notice of a judgment before taking a mortgage on the premises of the judgment-debtor is not a *bona fide* purchaser.

H. R. Storrs and T. J. Oakley, contra. The defendant was a *bona fide* purchaser: *Lawless v. Hackett*, 16 Johns. 149; *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320; 2 Bl. Com. 241; *Chapman v. Emery*, Cowp. 278. When the legal and equitable estate unite at law, the latter is merged in the former: *Gardner v. Astor*, 3 Johns. Ch. 53 [8 Am. Dec. 465]; but in equity it is admitted that there are exceptions, citing and examining the cases referred to by the opposite counsel.

WOODWORTH, J. On the seventeenth of June, 1817, Caleb Johnson gave a mortgage to James O. Wattles, to secure the payment of twelve thousand dollars. On the second of August, 1817, a judgment was docketed in favor of Wattles against Johnson, for two thousand dollars. Execution issued on this and three other judgments (all subsequent to the mortgage), and on the twentieth of April, 1818, the mortgaged premises were sold in separate parcels. William H. Sabin purchased the first parcel for two hundred and five dollars, which, at the time of sale, was worth two thousand dollars. Wattles purchased

the residue at four hundred and forty dollars. The value of the mortgaged premises appear to have been somewhere between six thousand dollars and ten thousand dollars. Deeds were executed by the sheriff to the purchasers. Reuben West testified that before the close of the sale, he heard Wattles publicly say, he had a mortgage on the property, executed by Johnson. Several other witnesses testified that they were present, and heard no claim set up under the mortgage. It is in proof that before the sale Wattles at different times stated that Johnson had given a quitclaim deed of the premises. This evidence, however, is insufficient to establish a release; it was so considered by the chancellor, and was not pressed on the argument. After the sale Wattles repeatedly declared he had purchased the equity of redemption, and that his title to the property was then complete. Notwithstanding these declarations, it is very evident he did not consider the mortgage extinguished. Nichols P. Randall testified after the sale he asked Wattles, why he let Sabin bid off the property for so small a sum? He answered that Sabin would be glad to give it up, as he had enough upon it to induce him to do so. Randal believes that the mortgage was mentioned as the incumbrance upon the property. Whatever may have been the opinion of Wattles as to the then state of his title, it is apparent he did not consider the mortgage a mere *caput mortuum*, but a valid security.

On the ninth of November, 1818, Wattles, for the consideration of nine thousand three hundred and thirty-one dollars, assigned the bond and mortgage of Johnson to the appellant, and covenanted that there was due twelve thousand dollars. On the same day, for the purpose of giving additional security, he executed a bond and warrant of attorney to confess a judgment, which was docketed on twelfth of November, 1818. On the twenty-first of August, 1819, an amended specification was filed. On the twenty-sixth of May, 1818, Sabin assigned his right and title in the mortgaged premises to Wattles. On the fourteenth of June, 1819, Wattles quitclaimed the premises to the respondent for the alleged consideration of ten thousand dollars. The deed, though absolute in its terms, was given to secure the respondent against a note of five thousand dollars, and a bond of indemnity executed to Amos Granger. As additional security, Wattles made an assignment, dated June 14, 1819, of his share of the partnership goods and effects in the firm of D. Morey & Co., and also all the personal property belonging to him, then at their distillery, ashery, store and shop in Onondaga. Under

this assignment the respondent became entitled to, and actually received a large amount of merchandise, with other articles which constituted a fund, to be applied to the particular objects specified in the assignment. What the result would be on an account taken, cannot at present be particularly ascertained, nor is it material to inquire, if the appellant is entitled to hold the mortgaged premises to satisfy his claims.

The appellant appears to be a fair purchaser of the bond and mortgage; John Meeker was justly indebted to him in nine thousand three hundred and thirty-one dollars, for goods sold; Wattles assumed the debt, and Meeker was discharged. As a consideration for this responsibility, Wattles received from Meeker a large amount in goods, which afterwards passed to the firm of Morey & Co. The bond and mortgage were taken in the regular and ordinary course of business. Nothing like unfairness is discoverable, and the appellant dealt with the mortgagee on equal terms. The assignment was not a suspicious instrument, as his honor, the chancellor, seems to consider it. Such a conclusion casts a shade over the transaction, at variance with its real character.

The most important question is, whether the purchase of the equity of redemption, by uniting the equitable and legal estate, created a merger, and thereby prevented the mortgagee from setting up the mortgage as a subsisting security. The rule is, that wherever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase, is said to be merged, that is, sunk or drowned in the greater: 2 Black. Com. 177; 3 Lev. 437; 2 Rep. 60, 61.

I have not met with any case where the question of merger was raised on the union of part of the equitable and legal interest; yet do not perceive any valid objection to allow it *pro tanto*. The inquiry now is, does the doctrine of merger apply? In *Jackson v. Hull*, 10 John. 481, the mortgagee obtained judgment, and on execution, the equity of redemption was sold to a purchaser for less than the debt. In an ejectment by the mortgagee, to recover the premises, the court considered that the sale was only of the *residuum* of interest remaining in the mortgagor after the execution of his mortgage, and that the mortgagee was entitled to recover. In Co. Lit. 338, b., it is said: "Mergers were never favored in courts of law, and still less in courts of equity." They are never allowed, unless for

special reasons, and then only to preserve the intention of the parties: 15 Vin. 362, a, 5; *Phillips v. Phillips*, 1 P. Wms. 41.

When there is a union of rights, equity will preserve them distinct, if the intention so to do is either expressed or implied: 4 Brown, C. C. 403. The distinction stated by Lord Hardwicke is, that when the owner of the fee, in which the charge would otherwise merge, manifests his intent that the charge should subsist, his intent, if clear, shall prevail: *Chester v. Willis*, Ambler, 246; 2 Fonb. 169, n. a. In *Compton v. Oxenden*, 2 Ves. jun. 264, Lord Thurlow observes: "It is a clear principle, both at law and in equity, that where there is a confusion of rights, where debtor and creditor become the same person, there is an immediate merger, but that equity will preserve the rights distinct, according to the intent expressed or implied. Wherever it is more beneficial for the person entitled to the charge, to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, that circumstance will have a controlling influence in deciding on the implied intent." The argument on both sides seems to have proceeded in accordance with these principles; the respondent contending that Wattles had uniformly manifested his intention to consider the mortgage merged, by declaring himself the absolute owner of the premises purchased at the sheriff's sale.

The offer of Wattles to sell as absolute owner, and his declarations prior to the assignment of the mortgage to the appellant, are supposed, by the respondent's counsel, to be decisive on this question; but I apprehend they ought not to be viewed in that light. Whatever opinion Wattles may have formed on the question of law under discussion, it is perfectly clear he did not consider his mortgage extinguished, for immediately after the sale he speaks of the mortgage as the incumbrance relied on to induce Sabin to give up his purchase. He may have declared that he was the owner, but in making out his right to that character, he evidently did not lose sight of an existing mortgage, and considered it as forming a part of his title. Whether he had correct legal notions on this question is perfectly immaterial; the point is, did he declare or intend to declare that the mortgage was extinguished? If he did not, the proof is defective. His view of ownership, we must understand, as consistent with a valid incumbrance by way of mortgage. His declarations were substantially correct at least so far as any purchaser could have an interest; and admitting the mortgage was not merged, yet Wattles, having an election to treat it in

that manner, might well offer to convey a good title; for the moment he executed a conveyance of the fee-simple of the estate, then his election having been carried into effect, the purchaser would acquire a good title, and the mortgage be extinguished. No fraud would be committed; for until Wattles acted, his declarations were indifferent. Until there was some person in interest, no one had a right to complain, whether he represented himself as owner, or rested on the mortgage as a valid security. Whatever Wattles may have said, one fact of decisive importance is conceded, no individual obtained any interest or claim upon the premises from the twentieth of April, 1818, when the sale took place, until the ninth of November following, when the assignment to the appellant was made. But there are other facts in this cause, which, on the supposition that Wattles was of sane mind, are irreconcilable with the idea of merger. That portion of the premises bought by Sabin was worth, unincumbered, two thousand dollars; it was bid off for two hundred and five dollars. Would the mortgagee stand by and permit this purchase, if resort could not be had to his mortgage? Could he have so intended? Certainly not. When he purchased the residue himself, did he intend that the mortgage should merge thus far, and take his chance of establishing its validity as to the portion purchased by Sabin? I apprehend not. His security and interest concurred in suffering the charge to remain. Besides, it is in proof that the mortgaged premises were not equal in value to the amount due.

If the mortgage is extinguished on the principle of merger, it can no more be set up than if it had been fully paid. What then becomes of the bond? If the mortgage is satisfied, it is declared that the bond, given as collateral security, shall also be void. Could Wattles have intended to abandon all claim to the residue? And if not, did he, against his interest, intend that a merger should take place and unnecessarily risk the issue of the question, whether Johnson was any longer holden on the bond?

But if Johnson was not exonerated, what is to be the measure of recovery? How is it to be ascertained? If entitled to relief when prosecuted on the bond, it must be by drawing the mortgagee into an expensive litigation in chancery in order to ascertain the extent of his liability, and how much shall be credited to him from the bond?

But the conclusive answer to the argument, derived from the declaration of Wattles, that he was the absolute owner, is this: Until he made a disposition of the property, and until some

person acquired an interest, he was at perfect liberty to consider the mortgage merged or not, as might be most beneficial. If the question is to be decided by intent, express or implied, when does it become fixed and unchangeable? Certainly not until some person acquires an interest, and thereby obtains a right to draw it in question. It would be novel in principle, and, I apprehend, without precedent in any book of authority, that a stranger should urge, "You once declared the mortgage was merged, and, although, at the time, it was indifferent to all the world in what manner you treated it, you are bound by that election." It does not appear that Wattles had done any act previous to the ninth of November, 1818, which prevented his setting up the mortgage as a charge on the land. On that day he made his election, acted under it, and for a *bona fide* consideration, assigned to the appellant. The intention not to consider the mortgage merged, then, and not before, became fixed. At this time there was no conflicting claim.

There is no principle of law or equity with which I am acquainted, that can, on the present state of facts, rightfully deprive the appellant of the security thus taken. Whatever question there might be as to Wattles's intent previously, none could exist after this transfer.

But it is contended that the appellant was bound to record the assignment in order to protect himself against a subsequent transfer by Wattles. The received opinion has been that, except in certain counties, an assignment need not be recorded. The premises in question do not lie in what is termed the military tract, and consequently are not governed by the act requiring all deeds and conveyances of, or concerning, or whereby any of the military bounty lands may be affected in law or equity to be recorded. The act of March 23, 1821, first directed the recording of deeds, conveyances or writings concerning lands in the towns of Onondaga and Salina, where the premises are situated. The act concerning mortgages, 1 R. L. 372, prescribes the manner in which the mortgage shall be registered, but does not extend to the case of an assignment; it was therefore optional with the appellant to record or not. The omission cannot be urged as a ground to postpone his security.

If the assignment had been recorded it would not have been noticed, for the plain reason that recording was not required by law. The principle is well settled that when an assignment of a mortgage takes place without the privity of the mortgagor, the assignee takes subject to the account between the mort-

gagor and the mortgagee: *Mathews v. Wallwyn*, 4 Ves. jun. 118; and that payments to the mortgagee, after an assignment without notice, must be allowed by the assignee: *Williams v. Sorrell*, 2 Ves. jun. 389. I apprehend this is all the risk the assignee incurs. I have not met with any case that places the rights of the assignee on other or different ground, or that gives countenance to the suggestion that the assignee must at his peril give notice to a subsequent assignee or purchaser from the mortgagee. Such a doctrine is not only most unreasonable in itself, but would shake the foundation of security by mortgage assignment, hitherto deemed equal to that of the original mortgage, with the exceptions I have stated. It would, in fact, be no security beyond the responsibility of the person making the assignment; for the assignee has no means of ascertaining how often, and to whom, the mortgagee may have subsequently assigned. Such notice is not necessary for the protection of a subsequent purchaser. The registry of the original mortgage is notice to him of its existence. If he will deal without asking for the mortgage or requiring it to be cancelled, he comes without a semblance of equity to demand that the prior *bona fide* assignee shall be postponed to his claim. Where the mortgagee makes a second assignment the assignee knows that a prior assignment may have been made, and consequently must, as to that fact, repose on the responsibility and integrity of his assignor. If he should be deceived, it is more equitable that he should suffer than to divest the right of the first assignee, who had acquired the legal estate.

But is this pretended hardship anything more than every purchaser of land was liable to since the existence of this government, until the last acts requiring deeds to be recorded? Every grantor had the power of recording a second time, and no doubt the power was sometimes exercised by fraudulent individuals. It was never seriously urged that the second purchaser had any remedy against the first purchaser, because his deed was not recorded, or notice given. The conveyance by Sabin to Wattles, on the twenty-sixth of May, 1819, does not change the rights of the appellant. There being no merger as to any part of the mortgaged premises, the mortgage stands valid, and is not affected by any of the subsequent transfers.

But it is contended by the appellant, that independent of the assignment, he gained a priority, in consequence of the judgment docketed against Wattles, November 12, 1818. The act of April 21, 1818, required the filing of a particular statement

and specification of the nature and consideration of the debt or demand. If omitted, the judgment shall be adjudged fraudulent, as respects other *bona fide* judgment-creditors, and every *bona fide* purchaser for valuable consideration. According to *Lawless v. Hackett*, 16 Johns. 149, the first specification did not comply with this act. I am not inclined, at this day, to unsettle that rule. It has been acted upon and recognized in the supreme court, and in chancery, as giving the true construction of the statute. No doubt valuable estates have been acquired and are now held under it, though if it were *res integra*, it might be questionable whether the statute required so minute a specification. The judgment, then, under the first specification cannot avail, if the respondent be considered a *bona fide* purchaser for a valuable consideration, within the meaning of the act.

It is held in England, under the statute 27 Eliz. respecting conveyances made to defraud purchasers, that a mortgagee is a purchaser within the act, although the statute speaks only of estates of inheritance for life or years: 3 Cruise, 378, tit. 32, ch. 22, secs. 38, 49: *Chapman v. Emery*, Cowp. 280. The term purchase is of very extensive signification, and comprehends every species of acquisition in contradistinction to hereditary descent and escheat: Co. Lit. s. 12. In equity, a purchaser is considered a person who, without fraud, and for a valuable consideration, acquires a right or interest, and is, therefore, so far favored, that his title shall not be impeached in equity: 1 Eq. Ca. Ab. 353 a, and the cases there cited. I think the terms of the act may be satisfied by including mortgagees in the word purchasers. Although the popular understanding is, a purchaser in fee, the reason and spirit of the act protect the mortgagees, as well as subsequent judgment-creditors. The former are equally within the mischief intended to be remedied.

This being the construction of the act, it seems to follow that notice of such a judgment cannot prejudice the respondent's rights; for it is only notice of a judgment declared by the act to be fraudulent, and consequently not obligatory on the respondent.

But it is contended that the respondent did not purchase *bona fide*, because he had notice of the appellant's judgment, and the case of *Dunham v. Dey*, 15 John. 568 [8 Am. Dec. 282], is supposed to support this doctrine. There is, however, a manifest distinction. In that case it was decided that a person who takes a conveyance of land, with notice of a prior unregistered

mortgage, is not a *bona fide* purchaser, who can gain a priority by having his deed first recorded. Now the unregistered mortgage was a valid security. It had every essential of a just demand between the parties. It could only be defeated by an omission to register, if a purchaser intervened. But notice in such a case supersedes registry. The object intended by the statute, which is to apprise the purchaser is attained. The unregistered mortgage is not declared fraudulent, but shall be postponed.

The statute relating to specifications had other objects in view. Numerous frauds had been committed by entry of judgments on bonds and warrants for fictitious demands. To detect the fraud was a principal object, by requiring a minute statement, which would enable the purchaser, or subsequent judgment-creditor, to unravel a fraud. If this was not filed it was then adjudged fraudulent. The creditor might disregard it. He had a right to consider it fraudulent. If notice of such a judgment is a substitute, the statute is a nullity. Apply the doctrine to a subsequent *bona fide* judgment-creditor. He has notice of the first judgment, but the other essential is wanting—a good specification. The judgment, then, cannot strengthen the appellant's claim. He must rest on his assignment, which, in the view I have taken, is amply sufficient.

It has been contended, that if the appellant took nothing as assignee of the mortgage, by reason of the merger, then he is entitled to the premises, under the words granting the same to him, his heirs and assigns forever. This ground, I think, would be tenable, if the granting words were not restricted in their operation; but the *habendum* is, "to hold the same as fully as the mortgagee might hold and enjoy the same by virtue of the mortgage and bond accompanying the same." These expressions unequivocally show that no right or title was granted, but such as might be acquired by the assignment of a subsisting mortgage.

If it be admitted that the respondent is entitled to the prior lien, then I am of opinion the decree is erroneous, in allowing the respondent to be satisfied out of the mortgaged premises, to the whole extent of the balance due him. His conveyance was solely a security for a note of five thousand dollars, and a bond executed with Wattles to Amos P. Granger.

The first objection to this allowance is, it nowhere appears that Wattles ever assented that the mortgage should secure anything beyond the specific objects for which it was given. The assignment of the partnership goods to the respondent was

subsequently taken as a collateral security. There is no proof that advances were made on the credit of the original security. A mortgage made to secure against future, as well as present, responsibilities, is undoubtedly good. In some cases, a subject pledged for a debt may be considered as a security for further loans. The cases referred to by his honor, the chancellor, in *Hendricks v. Robinson*, 2 Johns. Ch. 309, do not support the right claimed by the respondent. In *Shirras v. Craig*, 7 Cranch, 34, the mortgage was executed, in part, to secure the payment of money actually due at the time, and in part to secure sums to be advanced. So in *The United States v. Hooe*, 3 Cranch, 73, the mortgage was to secure against existing and future responsibilities. The attempt here is without any understanding or agreement to hold the mortgaged premises charged for a general balance. It is highly probable, from the testimony, that on an account taken, after first applying partnership property to the payment of partnership debts, a sufficient sum will remain out of the merchandise and other articles assigned as collateral security with the mortgage, to pay off and discharge the note of five thousand dollars, and the responsibility incurred by the bond to Granger.

The rule laid down in *Jones v. Smith*, 2 Ves. jun. 376, is, that a mortgage cannot tack a bond against the mortgagor, nor against creditors, but may against the heir, to prevent circuity of action. But if the heir assigns the equity of redemption, the assignee who brings his bill to redeem shall pay the mortgage only, and not the bond: 1 P. Wms. 776. In *Lowthian v. Hazel*, 3 Brown's Ch. 162, it was held that a mortgagee, having also a bond, cannot tack it against other specialty creditors, though he may against the heir. Lord Thurlow observes: "In natural justice the right has no foundation; the creditor having another special security, cannot give him, in justice, any priority; it has not been done in any case, but that of the heir, and merely to prevent circuity." So in *Hamerton v. Rogers*, Ves. jun. 513, a bill of foreclosure was dismissed with costs, so far as it sought to tack a bond to a mortgage against creditors. To these may be added the case of *Ex parte Hooper*, 1 Mer. 7, where a mortgage was held no security for subsequent advances made on the strength of a parol engagement.

These cases conclusively show that the respondent cannot divert the securities taken from the objects specified, when it formed no part of the original agreement, nor was ever assented to subsequently by Wattles, and particularly when an objection

is interposed by a *bona fide* creditor holding a judgment made valid by an amended specification.

But even admitting that the respondent may apply the fund to satisfy advances not contemplated when the mortgage was given, the doctrine will not allow such application after the twenty-first of August, 1819, when the amended specification was filed, from which time the judgment became operative against subsequent judgment-creditors and purchasers, and became a lien on the mortgaged premises. If the respondent is allowed for advances between the fourteenth of June and twenty-first of August, 1819, I apprehend the allowance must stop there. The appellant's right then became perfect to require that the fund remaining be exclusively applied to discharge the note and bond of indemnity. After that day, the respondent had no power to disregard the appellant's judgment. This point is not noticed by the chancellor. As its correctness cannot, I think, be well questioned, I presume it was overlooked; otherwise it would probably have produced a modification of the decree.

My conclusion, then, is that the appellant is entitled to hold the mortgaged premises under the assignment for the demand therein specified, on the ground that there was no merger, and consequently that the mortgage was a valid security. But, secondly, if it were otherwise, then I am of opinion that all the property received by the respondent, under the assignment made by Wattles subsequent to the mortgage, be applied, if necessary, in discharge of the note of five thousand dollars, and the bond of indemnity, after first satisfying partnership debts due on the fourteenth of June, 1819, and that the mortgaged premises be holden by the respondent as charged with the balance only, if any, after making such appropriation; it being the clear intention of the parties that the fund should, in the first instance, be exclusively applied in this manner. If, however, it be decided that the securities cover subsequent advances, they ought only to include such as were made between the fourteenth of June and twenty-first of August, 1819, when the appellant's judgment becoming effectual, interposed a legal and equitable barrier against a further allowance.

I am of opinion that the decree of his honor, the chancellor, be reversed.

SUTHERLAND, J. The great question in this case is, whether the mortgage given by Caleb Johnson to James O. Wattles, on the twenty-fourth day of June, 1817, and which was assigned

by Wattles to William James, the appellant, on the ninth day of November, 1818, was, at the time of such assignment, an unsatisfied and subsisting mortgage. For, although many other topics are presented by the case, and were elaborately and ably discussed by the learned counsel who argued it, a diligent examination has satisfied me that the question of merger must control the decision of this court.

The facts out of which this question arises are briefly these: One Caleb Johnson, being indebted to James O. Wattles in the sum of twelve thousand dollars, for the purpose of securing that sum executed to him, on the twenty-fourth of June, 1817, a bond, together with a mortgage, on certain lots and buildings in the village of Onondaga. The mortgage was duly registered on the seventeenth day of July thereafter. On the twentieth day of April, 1818, all the right and title of Caleb Johnson to the mortgaged premises were sold by the sheriff of Onondaga, under several executions on judgments against Johnson, obtained in the Onondaga common pleas. The premises were sold in two parcels. The first under a judgment in favor of Wattles for two thousand dollars, of which William H. Sabin became the purchaser for the sum of two hundred and five dollars. The residue under four other judgments in favor of different persons, of which residue James O. Wattles became the purchaser for the sum of four hundred and forty dollars. Conveyances were, on the same day, executed by the sheriff to Sabin and Wattles for the parcels just purchased by them respectively. All the judgments were subsequent to the mortgage. Nothing passed, therefore, by the sale and conveyances of the sheriff but Johnson's equity of redemption in the mortgaged premises.

Wattles being thus the owner of a mortgage on the whole of the premises, and of the equity of redemption in a portion of them, became indebted to William James, the appellant, in the sum of nine thousand three hundred and thirty-one dollars; and for the purpose of affording to him additional collateral security, on the ninth day of November, 1818, assigned to him the bond and mortgage in question, covenanting in the assignment, that the sum of twelve thousand dollars remained due. On the twenty-sixth day of May, 1819, Sabin conveyed to Wattles all his estate and interest in the mortgaged premises; and on the twenty-first day of July thereafter, Wattles conveyed the whole of the premises to the respondent, Davenport Morey, by way of security against certain responsibilities in-

curred by Morey for him. The deed bore date on the fourteenth of June, 1819, and though absolute in terms, is admitted to have been given by way of security or mortgage only. It was recorded as a deed on the thirteenth day of January, 1821.

The respondent, Morey, expressly denies, in his answer, any notice or knowledge of the assignment of the mortgage from Wattles to James, until the fall of the year 1820, and there is no evidence in the case to falsify or impeach this denial. I shall, therefore, consider him in the discussion of this point, at least, a *bona fide* mortgagee, standing in equal equity with the appellant, entitled to contest with him, and, if he can, to impeach upon principles either of law or equity, the validity of his prior incumbrance.

It is contended, on the part of the respondent, that admitting the mortgage to have been a subsisting security at the time of its assignment to the appellant, he having neglected to record the assignment, cannot set up the mortgage as against the respondent, who had no notice of its assignment when he took his conveyance of the fourteenth of June, 1819.

If this proposition can be sustained, it must be, I apprehend, upon one of two grounds, either that the assignment of the mortgage was required, by law, to be recorded, or that the respondent stands in the place of the mortgagor, and is entitled to have all the equities subsisting between him and the mortgagee, at the time when he received notice of the assignment, adjusted and satisfied, before the assignment can take effect.

It was admitted upon the assignment, that the registering act of January, 1794, in relation to military bounty lands, has no application to this case; the premises in question being in the Onondaga reservation, and that reservation being no part of the military bounty lands. And there was no other act requiring deeds, in relation to lands in the Onondaga reservation, to be recorded, until the act of March 23, 1821, which applied to conveyances only, made after the first of July following.

At the time, therefore, when the appellant became the assignee of the mortgage, there was no law requiring him to record the assignment. If he had caused it to be recorded, it would have been a voluntary and inefficacious act. In judgment of law, it would have been notice to no one: *Bushell v. Bushell*, 1 Sch. & Lef. 103; *Latouche v. Dunsany*, Id. 157; *Underwood v. Lord Courtown*, 2 Id. 64; *Morecock v. Dickens*, Ambl. 678. Not to the mortgagor, because he is entitled to actual notice, and would

not be affected with the constructive notice resulting from a registry of the assignment, even if it was required by law to be registered. Not to the subsequent grantee or mortgagee, because the law will not intend that to be known, for the existence of which there is no legal necessity. No presumption can be indulged, that if the assignment had been recorded, the respondent would have become apprised of the fact. He was not bound to examine the record. It is not, therefore, to be supposed that he would examine them.

The rights of the appellant, therefore, are not affected by the circumstance of his not having recorded the assignment of the mortgage. There is no doubt of the position, that the assignee of a mortgage takes it subject to the equities which may exist between the mortgagor and mortgagee, or which may accrue at any time before notice of the assignment is brought home to the mortgagor: *Matthews v. Wallwyn*, 4 Ves. jun. 118; *Williams v. Sorrell*, 4 Id. 389. But this principle, I apprehend, is confined to transactions between the mortgagor and the mortgagee, and, from the very nature of things, is inapplicable to dealings between the mortgagee and third persons.

If I have been successful in showing that the assignee is not bound to record the assignment, and that a voluntary registry would not be constructive notice to any person, then it necessarily follows, that whatever notice is required to be given, must be actual and not constructive, for I know of no other act which it can be supposed the assignee was bound to perform, from which notice could be inferred, except the act of registering. Now, it is utterly impossible for the assignee of a mortgage to know with whom the mortgagee may subsequently deal in relation to the mortgaged premises. Take the case before the court. How was the appellant to know, on the ninth day of November, 1818, when he took his assignment, that Wattles, on the twenty-fourth day of June, 1819, would convey the mortgaged premises to the respondent? If he had no means of knowing that he was, or was to become interested in the subject-matter of assignment, how could he give him notice that he was the proprietor of the mortgage?

The case of *Williams v. Sorrell*, 4 Ves. 389, which the chancellor cites in support of the broad position, "that all dealings with the mortgagee, before notice of the assignment, are valid," was a case between the mortgagor and the assignee of the mortgage, and the simple question was, whether, after an assignment of the mortgage, payments made by the mortgagor to the

mortgagee, without actual notice of the assignment, were to be allowed. It was held that they were, although the assignment had been registered. The same principle was settled in *Matthews v. Wallwyn*, 4 Ves. 118, and I am persuaded, there is not a case to be found, in which the principle has been applied to dealings between the mortgagee and third persons: See *Clute v. Robinson*, 2 Johns. 595.

Indeed, the chancellor has most clearly recognized and enforced the distinctions in the cases of *Murray v. Lythburn*, 2 Johns. Ch. 441, and *Livingston v. Dean*, Id. 479. In the first case he says: "It is a general and well settled principle, that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignee. The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the claim of the assignee, without notice of a chose in action, was preferred in the late case of *Redfearn v. Ferrier*, 1 Dow. 50, to that of a third party setting up a secret equity against the assignor. Lord Eldon observed, in that case, that if it were not to be so, no assignment could ever be taken with safety. I am not aware that this decision was the introduction of any new principle, in the case of actual *bona fide* purchasers, or assignments by contract." In *Livingston v. Dean*, the chancellor remarks: "Though the assignee of a bond and mortgage takes it subject to all the equity of the mortgagor, yet, as to the latent equity of a third person against the mortgagee, as possessor of the mortgage, the case is different. The assignee does not take the mortgage subject to such an equity, unless he has notice of it, expressly or constructively.

Admitting, therefore, that the equity of the respondent, whatever it may be, as it respects the mortgagee, had existed at the time of the assignment of the mortgage to the appellant, instead of being bound to give notice of the assignment to the respondent, the appellant would have held the mortgage discharged from the respondent's equity, unless he had personal notice of it. But it is said that the appellant suffered Wattles to remain

in possession of the mortgaged premises after the assignment, claiming as owner, whereby he enabled him to perpetrate a fraud, by dealing with the property as his own. The possession of Wattles was consistent with the claim of the appellant. He claimed only as a mortgagee. Wattles was in fact the mortgagor, and according to the established usage of the country, was permitted to retain possession.

The rule, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have: *Taylor v. Stibbert*, 2 Ves. 437; *Hiern v. Mill*, 13 Id. 118; *Hall v. Smith*, 14 Id. 426; *Daniel v. Davison*, 16 Id. 249, and all the consequences which flow from it, are applicable to this case. No such tenant, nor any one claiming under him, contest the rights of the appellant. If Morey was in possession at the time of the assignment to the appellant, it was as tenant to Wattles, either at will, or from year to year; and not as pretending to claim any right of property in the premises. Whatever his rights were, they all accrued subsequent to the assignment. But Morey was not, at that time, in possession. I shall have occasion hereafter to show that he did not go into possession until December, 1818, at the shortest, and probably not until still later. Johnson, then the mortgagor, was still in possession. Does he, or any one claiming under him, attempt to impeach the equity of the appellant?

I have already said that the possession of Wattles, after the assignment, was consistent with it; and if he pretended to be the absolute owner of the property, the law will not charge the appellant with knowledge of such claim; nor can he be held responsible for the consequences which may result from it, however fraudulent they may be, unless he is made a party to the fraud, by proof that he knew that Wattles claimed to have the absolute estate, and, after such knowledge, still left him in possession. Whether knowledge of such claim would make him a party to the fraud, it is not necessary to inquire, for there is not the least evidence in the case to affect him with such knowledge. I am, therefore, clearly of opinion that the appellant has not forfeited, by any act, either of omission or commission, any right acquired by him under the assignment of November 9, 1818.

It remains, then, to inquire into the nature and extent of the interest which passed by the assignment. Wattles, at the time of the assignment, had the legal estate as mortgagee in the whole of the mortgaged premises, and the equitable interest of the mortgagor in about two thirds, under the purchase made by him,

at the sheriff's sale, on the twentieth of April, 1818. The equity of redemption in the remaining third being in William H. Sabin.

It is contended on the part of the respondent, that by the union of the legal and equitable estates in Wattles, the mortgage became extinguished, at least to the extent in which that union had taken place; that if the mortgage subsisted for any purpose after that union, it was only as an incumbrance upon that portion in which Sabin had the equity of redemption. The assignment to the appellant, therefore, it is contended, passed no interest in the residue.

A merger at law is defined to be "where a greater estate and a less, coincide and meet in one and the same person, in one and the same right, without any intermediate estate." The less estate is immediately annihilated, or in the law phrase, is said to be merged, that is sunk or drowned in the greater. Thus, if there be a tenant for years, and the reversion in fee-simple descends to, or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more." 2 Black. Com. 177.

The rule in equity is the same as at law, with this modification, that at law it is invariable and inflexible. In equity it is controlled by the expressed or implied intention of the party in whom the interest or estates unite: *Compton v. Oxenden*, 4 Brown Ch. Cas. 403; 2 Ves. jun. 264; *Forbes v. Moffatt*, 18 Id. 384; *Wade v. Paget*, 1 Brown Ch. Cas. 368; *Gardner v. Astor*, 3 Johns. Ch. 53 [8 Am. Dec. 465].

It was argued for the appellant, that the doctrine of merger is not applicable to this case, because the whole legal and equitable estates, in the whole subject-matter of the mortgage, were never united in the same person. It is obvious that there was no merger as to that portion of the mortgaged premises, in which Sabin acquired an equitable interest, because he had no legal estate, into which his equitable interest could sink. But I have been unable to realize the weight of the considerations which were drawn from this circumstance against a merger as to the residue.

The whole legal and equitable estates must unite, or there can be no merger. Blackstone says, 2 Com. 103: "An estate in lands and tenements, and hereditaments, signifies such interest as the tenant hath therein." The estate of Wattles, in the mortgaged premises, was his legal interest in each and every portion of them. The estate of Johnson in the same premises, was his equitable interest in each and every portion of them.

When Wattles, therefore, became the purchaser of Johnson's equitable interest in two thirds of the premises, the whole legal and equitable estates in those two thirds were united in him, and I can perceive no reasons why that might not have been a merger *pro tanto*.

Wiscots' case, 2 Co. Rep. 61, is a direct authority for the doctrine, that a portion of a particular estate may be merged without the residue. It is there said: "If the reversion be granted to a tenant for life, and another in fee, the estate for life is extinct for a moiety; for tenant for life cannot purchase or get the reversion or remainder of the same land, but the estate for life will be merged, having regard to the estate which he hath gotten in the reversion." That is, there shall be a merger so far as the particular and residuary estates unite. The tenant in that case having the whole of the estate for life, and a moiety of the reversion, only a moiety of the estate for life merged; leaving him with an absolute estate in one, an estate for life in the residue, reversion in fee in the stranger. This is a case precisely analogous in principle to the one before the court.

To say that after a merger has taken place there can be no foreclosure of the mortgage, nor any action upon the bond, and that therefore there can be no merger of a part of the mortgaged premises, is begging the question. There can, strictly speaking, perhaps be no foreclosure as to that portion in relation to which a merger has taken place, because the fact of merger presupposes the annihilation of the equity of redemption, which is the only object and effect of a strict foreclosure. But what is to prevent a foreclosure as to the residue. It can not be questioned that there may be a foreclosure as to a portion of mortgaged premises, and not as to the residue. It is the uniform practice of a court of chancery to prevent a sale of the whole mortgaged property, where it is made to appear that a portion of it will produce a fund sufficient to pay the mortgage debt; and where it is obvious that it would be either useless or inequitable for the foreclosure to embrace the whole mortgaged premises, there can be no doubt of the authority or the disposition of a court of equity to restrict it to a particular portion.

The only difficulty which it appears to me can possibly arise is as to the apportionment of the debt; and under the ample discretion which courts of equity exercise in relation to mortgage securities, I am persuaded that the difficulty from this

source would not be found formidable. All the parties in interest are necessarily brought before the court. The rights of all are disclosed, and the decree is moulded according to the exigencies of the various and complicated equities of the case. This plastic power of a court of equity has never been exercised with more vigor or benignity than in the chancery of this state. The case of *Tice v. Annin*, 2 Johns. Ch. 125, is but one of many illustrations which might be produced of the truth of this remark.

The same observations are applicable to the difficulty which, it is alleged, would be found in fixing the measure of recovery in any suit which might be instituted upon the bond for the balance remaining due after the merger. I am, therefore, of opinion that a merger in relation to that portion of the mortgaged premises, the legal and equitable titles in which were united in Wattles would not be prevented by the fact that no such union had taken place as to the residue. It remains, then, to inquire whether there was a merger of any portion of the premises; and this will depend entirely upon the intention of Wattles, either expressed or implied, that there should or should not be a merger.

The rule upon this subject is perspicuously stated by the master of the rolls, Sir William Grant, in *Forbes v. Moffatt*, 18 Ves. 389. He says: "It is very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he choose, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is with reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot." The same general doctrine is laid down and acknowledged in all the cases: *Ld. Compton v. Oxenden*, 2 Ves. jun. 263; *S. C.*, 4 Br. Ch. Cas. 398; *Thomas v. Kemeys*, 2 Vern. 348; *Gardner v. Aston*, 3 Johns. Ch. 53 [8 Am. Dec. 465]; *Mills v. Comstock*, 5 Id. 214; *Starr v. Ellis*, 6 Id. 393; 2 Fonbl. 162, c. 6, s. 8. One consideration, therefore, is, whether Wattles has done anything to determine that election which he undoubtedly had. If not,

the question will be upon the presumption of law under the circumstances of the case.

The first point to be settled under this head of inquiry is, within what period was Wattles bound to make his election whether the equitable and legal estates should remain distinct, or become united in his hands; for, until this is determined we know not what acts or declarations of his are to be taken into consideration. If he was bound to make his election within a given time, six months for instance, then we have only to examine whether, within that period, he did anything that determined the election. If not, then we resort to the presumption of law which arises upon the case; and that presumption must control, although it be repelled and contradicted by the clearest and most unequivocal manifestations of his intention, subsequent to the lapse of the given time. Most of the English cases have been decided upon the presumed intention of the party, there being no evidence of actual intention. Thus the case of *Ld. Compton v. Oxenden*, 4 Br. Ch. Cas. 398, was one of a lunatic, who was incapable of expressing any intention. So also of *Ex parte Grimstone*, Ambl. 706, and *Powell v. Morgan*, 2 Vern. 90; *Thomas v. Kemys*, Id. 348, and *Lawrence v. Blatchford*, Id. 457, were cases of infancy. An intention in the two first cases *Powell v. Morgan* and *Thomas v. Kemys*, had been expressed it is true, by the making of wills, but the lord chancellor, in *Ld. Compton v. Oxenden*, says: "The cases of infants turn upon a supposed intent. The court saw, in *Thomas v. Kemys*, that it was much more beneficial for the infant that the interest should continue pernal."

But in *Forbes v. Moffatt*, 18 Ves. jun. 389, the acts of the party were considered and examined for a series of years, and up to the time of his death, for some evidence of his intention as to the continuance or merger of the charge; and no act of his having been found, which was decisive upon the point, the case turned upon the legal presumption of his intention, that the charge should not merge, because it was for his interest that it should not. No resort was had to legal presumption of his intent, until the whole period between the time when the estates united and the death of the party (which was ten years), had been searched in vain for some conclusive evidence of his actual intention.

In *Gardner v. Astor*, 3 Johns. Ch. 53 [8 Am. Dec. 465], more than three years had elapsed after the union of the legal and equitable estates, before the mortgage was assigned. It was

heard upon bill and answer; of course there was no proof in the case, and no act appeared to have been done by Winter, between the time when the two estates came into his hands, and the time when he assigned the mortgage to Gardner. But the chancellor appears to have put his decree upon the ground that the assignment was, in fact, made subsequent to the conveyance to the defendant Astor; it not having been acknowledged until after that period, Astor swearing that he believed it was not made until after the conveyance to him, and there being no proof to show, as the chancellor remarks, when it was actually made.

The case of *Mills v. Comstock*, 5 Johns. Ch. 214, was decided upon its own peculiar circumstances, and the question of election did not there arise. The chancellor put his decree, upon the ground that the assignment of the mortgage to Comstock was a deed or conveyance within the meaning of the registering act of January 8, 1794, and not having been registered, was fraudulent and void as against Mills, who was a subsequent purchaser for valuable consideration. The assignment being void, the mortgage was to be considered still in the hands of Herrick, and the deed from him to Mills, being the first act of his which legally affected the transaction, must necessarily be considered as conclusive evidence of an election on his part, that the two estates should unite; because that deed purported to convey an estate which it could not convey unless a merger had taken place. But, as I have already remarked, the chancellor put it upon the ground of fraud.

In *Starr v. Ellis*, 6 Johns. Ch. 393, the chancellor does say "that unless some beneficial interest be shown to require the charge to be kept up, or the intention to keep up the charge be immediately and duly declared, it shall merge." Upon an examination of that case, it will be found that the assignment of the mortgage was from a father to a son. The bill alleges the assignment to have been fraudulent. The son appears not to have answered. The father, it is true, denies the fraud, and says the assignment was made in satisfaction of a debt due from him to his son. The proofs taken in the cause are not stated. What they must have been may be inferred from the language of the chancellor. He says: "The facts warrant the charge of a fraudulent combination between the two defendants to set up the mortgage to the prejudice of the plaintiff's title, which he purchased of the defendant, Samuel Ellis. The credit of the answer of Samuel Ellis is very much shaken by the proof

against the truth of some of its averments, and I am entirely satisfied that the mortgage has been fraudulently assigned, and set on foot to injure the plaintiff's title. The assignment to the son, if even before the plaintiff's purchase, was colorable only. The marks of fraud are upon every part of this transaction."

It will be perceived, then, that in the opinion of the chancellor, this was a case of actual, gross and glaring fraud; that the assignment was colorable only; and (admitting the mortgage to have been a subsisting security) would have been void, not only against a *bona fide* purchaser, but even against the creditors of the father. The question of merger did not, therefore, necessarily arise in the case; for whatever might have been the opinion of the chancellor upon that point, the assignment must have been declared void on the ground of fraud. The observation of the chancellor, therefore, "that the intention to keep up the charge must be immediately declared," comes to us with a diminished weight of authority. He must have perceived that the question of fraud controlled the case, and perceiving that, it is not disrespectful to him to suppose that he gave to the other features of the case a consideration less laborious and profound than he would otherwise have done. In questioning the correctness of that position, therefore, I consider myself as combating the impressions merely, and not the authority of the chancellor. But there was, in truth, in that case, a lapse of fourteen months between the purchase of the mortgage by Samuel Ellis and the assignment to his son. And if the case had turned upon the question of merger, all that would have been decided by it is, that if the party in whom the legal and equitable estates unite, does not, within fourteen months, declare his intention that they shall or shall not remain distinct, the law will presume his intention from the circumstances of the case. To establish the rule that the intention of the party shall be immediately declared, or the law shall declare it for him, would be virtually to take from him the privilege of election. How is he to make his intention known except by his acts in relation to the property which is the subject of the charge? Is not a reasonable time, then, to be allowed him? Is he to be compelled immediately to assign the charge, if he intends to keep it distinct? or to sell the fee, if he intends the charge shall merge?

If the law gives him the privilege of election, it will give him a reasonable time within which to make it. This appears to me

to be the good sense of the rule; and it is clearly sanctioned by the authorities to which I have adverted—particularly by the case of *Forbes v. Moffatt*. What is to be considered a reasonable time must depend, in some degree, upon the circumstances of each case upon the nature of the charge, the situation of the property, and the circumstances of the individual.

Let us, then, inquire whether Wattles, within a reasonable time after he became the purchaser of the equity of redemption, did anything which clearly manifested his intention that it should, or should not, merge in the legal estate. The circumstances relied upon to show that Wattles considered the mortgage as merged, and so intended, are, that after the sheriff's sale, he entered into possession of the premises; that he repeatedly declared the whole title to the Johnson property, except the interest acquired by Sabin at the sheriff's sale was in him, that he offered to sell it, and said he would give a clear title.

It does not appear that Wattles, himself, ever entered into the actual possession of the property. Johnson, the mortgagor, continued in the house until the spring of 1819—that is, for a year after the sale—and Morey, the respondent, took possession of the residue, under some agreement with Wattles, either in the fall of 1818, or the succeeding winter. Reuben West says he entered in December, 1818; Thadæus M. Wood says the latter part of the year 1818; Wm. Clark says in November or December, 1818; Asariah Smith says in the winter of 1818 and 1819. The witnesses all speak of the whole mortgaged premises; for the fifteenth interrogatory, to which these answers are responsive, asks when D. Morey went into possession of the premises contained in the deed marked B. Now, the deed marked B. is the deed of the fourteenth June, 1819, from Wattles to D. Morey, for the whole of the mortgaged premises. The entry, therefore, of Morey, as the agent or tenant of Wattles, extended not only to that portion, the equity of redemption in which had been purchased by Wattles, but also to that, the equity of redemption in which had been purchased by Sabin. The entry and possession were precisely the same in relation to both portions.

The question, then, is, in what character did he enter, as mortgagee or absolute owner? I answer, as to Sabin's portion, he must have entered as mortgagee, because he had no right to enter in any other character. The inference, then, is irresistible, that he entered as mortgagee, and mortgagee only. As far, therefore, as the taking possession of the mortgaged prem-

ises affords any evidence of Wattles's intention, it is that he meant to keep the legal and equitable estates distinct.

Sylvano Tousley, Thos. I. Gilbert, and Hezekiah L. Granger, all swear, that in the summer of 1818, Wattles claimed to have a complete and perfect title to the Johnson property, and a right to sell and dispose of it, except Sabin's portion; and so he most unquestionably had. He had the legal estate by his mortgage, and the equitable by purchase; and he had the power of uniting them whenever he pleased. But does the assertion of that fact afford any evidence of a present subsisting intention to unite them? Clearly not. It is well remarked by the master of the rolls, in *Forbes v. Moffatt*: "That the owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make is not whether he will take the estate or the charge, but whether, taking the estate, he means the charge to sink into it, or to continue distinct from it." I lay out of the case all the declarations which Wattles is said to have made, that he had a deed for the property from Johnson. They are clearly incompetent evidence, as against the appellant, of the existence of the deed. Nor do they, in my judgment, afford the slightest evidence upon the point now under discussion.

The assignment of the mortgage from Wattles to James, is the next event in the order of time; and, indeed, it was anterior to the possession of the mortgaged premises taken by Morey. The balance of the evidence is, that Morey did not enter until December, 1818. The assignment was on the ninth of November preceding. It was entitled, therefore, to be first considered in determining the intent of Wattles.

I apprehend there can be no difference of opinion, as to the decisive evidence which this assignment affords, of Wattles's intention to keep the charge distinct from the legal estate. It contained a solemn covenant that the bond and mortgage were a subsisting security, and that the sum of twelve thousand dollars was then due upon it. It was the first act on the part of Wattles, after the union of the two estates in his hands, which affords any evidence of his intention whether they should be kept distinct or not. It was within six months and a half after he acquired the charge, which I cannot consider an unreasonable time to allow him for making his election. It affords, then, in my judgment, competent and conclusive evidence of the actual intention of Wattles that there should be no merger, and precludes all inquiry into the presumption of intent which the

law, in the absence of such evidence, might have inferred from the facts in the case.

When the assignment was made, there were no claims or rights in conflict with it. Nothing had been done by Wattles to render it unjust or inequitable to keep the estates distinct, in conformity with his declared wish and intention. No man had dealt with him upon the legal presumption of merger, and no one had a right to question or impeach the transaction between him and the appellant. That the demand of the appellant, for which he took the assignment of the mortgage as security, was just and equitable, as against Wattles, has not been, and cannot be denied. He received for it a full and fair consideration, and unless he has forfeited the rights thus acquired, by his subsequent acts, he is entitled to a full and unconditional enjoyment of them.

I have endeavored to show that the appellant has done everything which he was bound by law to do. Let us inquire, for one moment, whether the respondent, in dealing with Wattles, exercised the caution which, as a prudent man, he ought to have done. It was a matter of public notoriety that Wattles had a mortgage upon the Johnson property. It was also matter of record, for the mortgage was registered. The respondent had legal, and undoubtedly actual, knowledge of the fact. When he took his conveyance, therefore, on the fourteenth of June, 1819, he knew that Wattles's titles to the property conveyed originated in a mortgage. He knew, then, that the mortgage was one of the title deeds of the estate. If he knew of the purchase of the equity of redemption by Wattles, he also knew, in judgment of law, that it was in the power of Wattles still to keep the equitable and legal estates distinct. He knew that an assignment of the mortgage by Wattles, immediately or within reasonable time after the purchase of the equity of redemption, would determine his election, and pass the legal estate to his assignee. He knew that the possession of the title-deeds, if not indispensable, is a measure of prudent precaution on the part of the purchaser; for he took from Wattles the deeds from the sheriff and Sabin to him. Did he thus act with the proper caution, not only in omitting to demand the mortgage as one of the title-deeds, but in omitting to make any inquiry concerning it? If he had asked for the mortgage, and its delivery had been evaded or refused, it would have excited suspicion and inquiry, which would have led to a discovery of the assignment. To whom, then, is negligence imputable, and who has trusted most.

The chancellor says: "The assignee has no right to complain. He dealt with a suspicious instrument that ought to have put him upon inquiry. He knew, or was bound to know, for it was matter of record that Wattles had purchased in the equity to at least three fourths of the premises. Why did he not record the assignment, and why did he not take a new mortgage?" The answer to most of these inquiries is to be found in the considerations which I have already submitted. James had no actual knowledge of the purchase by Wattles. The recording of the sheriff's deed was not notice to him in judgment of law; for, by law, it was not necessary to record it. He did not record his assignment for the same reason. He may not have taken a new mortgage, because he did not know that Wattles had it in his power to give one; or, if he did know it, he understood that a new mortgage could cover but three fourths of the premises, and he may have taken the assignment, because he preferred security upon the whole to security upon a portion of the premises. The instrument with which he dealt may have been a suspicious one, though I must confess, I have been unable to discover what rendered it so. But concede the fact that here was sufficient to put James upon inquiry, and that he did inquire, what discovery could the most diligent investigation have made which would have warned him against taking the assignment? He would have learned that the legal and equitable estates were both in Wattles; that he had done no act which evinced an intention on his part that the former should merge in the latter; that he had neither parted with, nor incumbered either; and that there was no living being whose rights or interests would be, in the remotest degree, affected by his determination to unite or to preserve the two estates distinct. If he had asked the respondent whether he had any interest in the question, he would have learned that he had not. The most diligent inquiry would, therefore, have resulted in a conviction, on the part of the appellant, that there was no legal or equitable objection to his taking the assignment. His right, therefore, is not only first in point of time, but it is supported by the better equity. I am accordingly of opinion that the decree of his honor, the chancellor, should be reversed.

It will be perceived that the view which I have taken of the case has rendered it unnecessary for me to consider whether the appellant's judgment was valid as against the respondent's mortgage or not, though I should be inclined to the opinion

that it was not, upon the authority of *Lawless v. Hackett*, 16 Johns. 149; and *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320, without having given to the subject much consideration. An examination of the accounts between Wattles and Morey is also unnecessary; for having come to the conclusion that the appellant's mortgage is first to be satisfied, the amount for which the respondent's is to stand must be perfectly immaterial to the appellant. If there should be any surplus, it may be matter of discussion between Wattles and Morey.

I have also omitted to consider what interest Sabin acquired in the mortgaged premises by this purchase at the sheriff's sale. Whether the equity of redemption merely, or the whole estate, in consequence of Wattles's silence as to his incumbrances; because, whatever he acquired passed to Wattles by his subsequent release, and neither he nor his grantee can set up the fraud to bar the incumbrance of the appellant. If he acquired from Sabin anything beyond the equity of redemption, it inured to the benefit and confirmation of his deed of assignment to the appellant, and did not pass by his deed to the respondent: *Trevivan v. Laurence*, 1 Salk. 276, 2 res.; *Palmer v. Elking*, 2 Ld. Raym. 1550; *Jackson v. Bull*, 1 Johns. Cas. 90.

SAVAGE, C. J. (after stating the facts, substantially as detailed by Woodworth and Sutherland, Justices): The appellant seeks to foreclose the mortgage assigned to him, or to recover the money on his judgment against Wattles. The respondent claims to hold the premises in pledge for the objects for which they were mortgaged, and also for a general balance due to him from Wattles. To determine correctly the rights of the parties, it becomes important to ascertain those of Wattles on the ninth of November, 1818.

The mortgage was given upon sufficient consideration, and there can be no doubt that the whole twelve thousand dollars, and more, were advanced by Wattles. It must then be still a subsisting incumbrance, unless it has become inoperative in consequence of the sheriff's sale of the twentieth of April, 1818. The sheriff sold the equity of redemption only: *Jackson v. Hull*, 10 Johns. 418. There is no pretense for alleging that the mortgagee, by his silence at the sale, forfeited his rights. His mortgage was registered, which was notice to all the world; and the judgments upon which the executions issued were younger than the mortgage. Two witnesses heard Wattles give notice of his claim; others, though present at the sale, did not hear this notice; but it is clear that the bidders knew of the

mortgage, or they would not have suffered property worth eight thousand or ten thousand dollars to be sold for six hundred and sixty-five dollars. That Sabin knew of the mortgages, is proved by his subsequently conveying to Wattles for a nominal consideration. Whether Wattles had a deed from Johnson, previous to the sale, I think very immaterial, as it must have been of later date than the judgments on which the sale was made. When, therefore, Sabin purchased one fourth of the mortgaged premises, there can be no doubt that he had a good title to the equity of redemption for so much, whether Wattles had a previous deed or not. Sabin was the owner of this equity of redemption on the ninth of November, 1818, and as to that part of the mortgaged premises there could be no merger. The mortgage was certainly valid *pro tanto*; and the appellant's right was complete before Sabin conveyed to Wattles, which was not until the twenty-sixth of May, 1819. The doctrine of merger, as derived from the decisions in Great Britain and this state, seems to be this: That when the legal and equitable estates become united in the same person, the equitable is merged in the legal estate, unless: 1. The party in whom they unite manifest an intention to keep them separate; or, 2. It is manifestly his interest to keep them so; but when it is indifferent whether they unite or not, or when an intention to unite them is shown, then they shall be united. In this case it has not been shown that Wattles had any interest in keeping the two estates separate; and so far as his intentions are in evidence, from his declarations or his acts, previous to his assignment of the ninth of November, they go to prove a merger. His declarations that he owned the whole property, and offers to sell, proves it.

In my opinion, therefore, the assignment of Johnson's mortgage, so far as the property purchased at the sheriff's sale by Wattles is concerned, can have no greater effect than that of an unregistered mortgage. At the time when this mortgage was assigned, the appellant took a judgment, which is not impeached as to the fairness of the transactions between the parties, but a technical objection is raised, that the specification required by the statute then in force, was insufficient. The decision in the case of *Lawless v. Hackett*, 16 Johns. 149, is in point and shows the objection to be well founded. In the view which I have taken of this subject, it does not become necessary to question the correctness of that decision. It may, however, be proper to remark, in passing, that the evil proposed to be

remedied by the law of 1818, was the facility of committing frauds in entering up judgments by confession; as it was the practice, whatever might be the real consideration, to state it to be money lent. The legislature, therefore, required the nature and consideration of the debt to be stated in the specification; but when the court carried it so far as to require every item of the plaintiff's account to be specified, the legislature seems to have considered the remedy worse than the disease, and, in 1821, repealed the act.

As the objection to this specification is strictly technical, if it be considered tenable, a technical answer should be received. By the act, a judgment without a specification, shall be adjudged fraudulent as it respects any other *bona fide* judgment-creditors, "and every *bona fide* purchaser for valuable consideration, of any lands bound or affected by such judgment." The respondent is not a judgment-creditor. He is simply a mortgagee. He is not, therefore, technically a purchaser: *Berry v. Mutual Insurance Company*, 2 Johns. Ch. 612; nor do I think the legislature contemplated a mortgage-creditor by the terms *bona fide* purchaser for valuable consideration. In the language of the chancellor in *Searing v. Brinkerhoff*, 5 Johns. Ch. 331: "Purchasers are there mentioned in contradistinction to creditors, and the word is used in the common and popular sense." "The act ought not to be extended by construction; and the ordinary lien of the judgment-creditor, who might happen through the inadvertance, or the error of counsel, to omit as particular a specification as the act required, ought not to be impaired except in favor of those particular persons, who can bring themselves clearly and strictly within the letter and within the meaning and policy of the exception. In my judgment, it is no answer to say that a mortgagee comes within the reason and policy of the act. The legislature may have had wiser reasons of excluding mortgagees from the benefits of this act, as well as the act authorizing the redemption of lands sold on execution:" *Matter of Saunders Van Rensselaer v. The Sheriff of Albany*, 1 Cowen, 801. It is sufficient for us that *ita lex scripta est*.

I am, therefore, clearly of opinion that the appellant is entitled to the benefit of his judgment. It was a perfect lien as against the respondent. He admits in his answer, that he knew of this judgment before the fourteenth of June, 1819, and he did not know till January, 1821, that there was any objection to the specification. All his arrangements were made with Wattles, and his securities taken, under the expectation

that the judgment was a lien upon the lands of Wattles, and to be satisfied in preference to his mortgage; and, in December, 1819, this judgment was the only obstacle in the way of an absolute purchase.

The result of my opinion on this part of the case is, that the plaintiff is entitled to the benefit of his judgment, and to his mortgage also, upon the fourth part of the premises purchased by Sabin at the sheriff's sale, on the twentieth of April, 1818. As to the other three fourths of the premises, the respondent, I think, is entitled to preference in the satisfaction of his mortgage, if anything remains after the payment of James's judgment, unless his rights are affected by other circumstances in the case, constituting the equities of the parties. This part of the case his honor, the chancellor, thought decidedly in favor of the respondent, and placed much reliance on the fact that the appellant had neglected to record the assignment. It was conceded on the argument, that the recording acts which relate to the military lands, have no application to the premises in question, they not being a part of those lands; and this concession destroys that part of the chancellor's argument, which is predicated on the necessity of recording the assignment. I know of no law requiring the assignment of a mortgage to be recorded.

If notice of the assignment is not given to the mortgagor, he is protected in any payments he may make to the mortgagees. And this is the extent of the risk run by the assignee, who neglects to give notice of the assignment. I have already stated, that I consider the appellant's assignment operative as to one fourth of the premises, and as to the other three fourths it must be placed upon the footing of an unregistered mortgage. The respondent's mortgage was recorded as an absolute deed, but was never registered as a mortgage. They are both, therefore, unregistered mortgages: *Dey. v. Dunham*, 2 Johns. Ch. 189. The second mortgage does not necessarily gain a preference, unless registered, and not even then, if the second mortgagee has notice of the first mortgage. The rule, "*qui prior est tempore, potior est jure*," applies, unless the appellant has been guilty of fraud or culpable negligence by leaving Wattles in possession of the mortgaged premises. Fraud is not imputed, and in point of negligence, the parties are equal. "It is a common rule," say the books, "that when of two persons equally innocent or equally blamable, one must suffer, the loss shall be left with him on whom it has fallen; and

here comes in the other rule, that the equities being otherwise equal, the priority of time must determine the right:" *Berry v. Mutual Insurance Co.*, 2 Johns. Ch. 603. It seems to me, therefore, that the appellant is entitled to preference as to the unregistered mortgage upon the three fourths of the property purchased by Wattles at the sheriff's sale.

But even if the respondent's mortgage were to have preference, it could extend only to the objects for which the indemnity was given, to wit, the Auburn note, and the Wattles and Granger debts. As an additional security, Wattles assigned all his stock, etc., and some other personal property. The parties have presented very contradictory statements as to the amount of the security afforded by means of the personal property. Taking the accounts attached to the respondent's answer, it appears that he had abundant security in this property. And as he knew of the appellant's judgment when he took that security, and did not then doubt its validity, he was most grossly negligent in omitting to indemnify himself.

On the whole case, therefore, I am of the opinion that the decree of his honor, the chancellor, should be reversed.

BOWNE, BURT, DUDLEY, GREEN, HATHAWAY, HUNTER, KING, LEFFERTS, MALLOREY, and REDFIELD, senators, concurred in the result of the opinions delivered as above by the judges.

CRAMER, Senator. In this case, from the facts detailed in the pleadings and proofs, it appears that Johnson gave a bond and mortgage to Wattles, to secure the payment of twelve thousand dollars, dated the twenty-fourth of June, and registered the seventeenth day of July, 1817. The mortgaged premises were sold on the twentieth day of April, 1818, by virtue of executions on several judgments, docketed subsequent to the execution of the mortgage. Wattles, the mortgagee, became the purchaser at the sale of three parcels of the premises, took a deed from the sheriff, and had it recorded on the twenty-eighth day of the same month. William H. Sabin purchased one parcel of the premises at the same sale, and Wattles, on the ninth day of November, 1818, assigned the mortgage of Johnson to the appellant, as security for a debt previously contracted by Meeker, for nine thousand three hundred and thirty-one dollars. Wattles, on the fourteenth day of June, 1819, for a valuable consideration, sold, in fee, the whole of the premises, covered by the Johnson mortgage, to the respondent. Prior to this conveyance, Wattles had purchased of Sabin all his right and title to

the mortgaged premises. But this purchase was not made until after the assignment of the mortgage to the appellant.

This is a brief summary of the facts in the case, which I have deemed most material in forming a correct decision. Several other points were made, and all very ingeniously discussed by counsel; yet it appears to me, from the view I have taken of the subject, that the real merits are confined to very narrow limits, and depend entirely on the doctrine of merger, as recognized and settled in the courts of law and equity in this country, and that from which we derive our system of jurisprudence. I will here premise that I consider this case, from all which has been presented to the court, a fair contest between *bona fide* creditors, to obtain securities for their respective debts or liabilities, from a debtor who was willing to defraud either of them.

I shall first, then, consider whether the legal and equitable estates had vested in Wattles under such circumstances that, in judgment of law, the mortgage was extinguished by merger as to those parts of the premises purchased by him at the sheriff's sale; and if so, secondly, whether that part purchased by Sabin, and quitclaimed to Wattles after the assignment, can, by any rule of law, be exempted from the operation of the Johnson mortgage in the possession of the respondent. From all the authorities which I have been able to examine, I consider the rule well settled, and I think it a rule founded upon good sense and justice, that when the legal and equitable claims are united in the same person, the equitable title is merged, and no longer exists except in special cases. In support of this position the cases of *Gardner v. Astor*, 3 Johns. Ch. 53 [8 Am. Dec. 465]; *Mills v. Comstock*, 5 Id. 214; *Starr v. Ellis*, 6 Id. 309; and *Compton v. Oxenden*, 2 Ves. jun. 261, are explicit and decisive.

The only exceptions to this rule are: 1. When there is a declared intention on the part of the mortgagee, that the equitable and legal titles shall continue distinct; 2. Where an intention to continue the mortgage may be fairly presumed from the acts of the mortgagee; and, 3. Where the law will presume such intention from the circumstances of the case, without regard to the acts of the mortgagee, which it will do in two cases: 1. When for the interest of the party the mortgage should continue; and, 2. When from the situation of the parties, as in the case of an infant, he cannot make his election. These are all the cases to be found in which the mortgage will be deemed

a subsisting incumbrance, when the mortgagee has the legal and equitable estates united in himself. But when it is indifferent to the party, whether the charge should or should not subsist, it always merges: *Forbes v. Moffatt*, 18 Ves. 393. Do the facts detailed in this case bring it within any of the exceptions above mentioned? To me it is obvious they do not.

The testimony taken in this case shows most conclusively that there was no declared intention on the part of Wattles that the mortgage should continue. All his acts and declarations before, at, and after the sale, manifest most unequivocally an intention on his part to unite the titles and to extinguish the mortgage; such as purchasing of Johnson the equity of redemption; his silence at the sale, and after sale, representing himself as absolute owner of the premises and offering to sell them in fee. The fact of his silence at the sale is supported by every witness who has testified, with the single exception of West, who says that he attended the sale, and after the property was put up by the sheriff, heard Wattles publicly say that he had a mortgage on the property executed by Johnson for twelve thousand dollars. But the testimony of West is contradicted, and I think perfectly destroyed by the witnesses examined who were present at the time; all unimpeached, and ten in number. And how could the declaration of Wattles, in relation to this mortgage, be deemed public, even if it were made to West, when the sheriff, and every other person present who has been examined, heard nothing of it. In fact, it is not to be presumed that Wattles should have made such a declaration in the presence and hearing of those witnesses, as he had before that time declared to most of them that he had purchased the equity of redemption of Johnson.

Nor can I imagine that any beneficial object, as to Wattles, could exist for continuing the mortgage. Indeed, it was for his advantage that it should merge; for by the merger, he became absolute owner in fee, and went into actual possession of the premises, whereby he was enabled to obtain a credit from the respondent, which, as mortgagee, he probably could not have obtained. There are no circumstances from which the law can raise a presumption in favor of the existence of this mortgage, either on account of any supposed advantage to Wattles, or any disability on his part to make an election. The mortgage being thus merged in judgment of law, no subsequent intention or act of his could make it a valid subsisting incumbrance as to that part of the premises purchased by him

at the sheriff's sale. This is a necessary consequence of the legal principle in relation to merger. The mortgage had become canceled, and was completely extinct, so far forth as the titles had united in Wattles. The assignment of this instrument to the appellant on the ninth of November, 1818, therefore, passed nothing, except the ratable proportions which that part of the premises purchased by Sabin would have to contribute. The true test of the assignee's rights is, what interest could the mortgage give at the time of executing the assignment? That, and that only, could pass to the appellant; for Wattles could confer no greater or other interest than such as he at that time possessed; and if he had legally released three fourths of the premises to Johnson from the effect of this mortgage before the assignment to the respondent, it would hardly be pretended that the assignee, under such circumstances, could hold the parts thus released still subject to the mortgage; and in judgment of law he had thus released before the assignment.

There is no rule more distinctly settled than this, that the assignee of a mortgage takes it subject to all the equities subsisting between the mortgagor and mortgagee at the time of the transfer. The circumstances of this case clearly demonstrate the propriety, the justice and the necessity of the rule, that whenever the two estates are united, the equitable estates should merge; otherwise, *bona fide* purchasers using every possible precaution and diligence might be defrauded or postponed to the assignee of a dormant mortgage.

But the decree of his honor, the chancellor, is, in my judgment, erroneous as to that part of the premises purchased by Sabin. In him there was no legal estate into which the equitable could sink. The legal and equitable estates were never vested in Wattles, he having parted with the former by an assignment of the mortgage to the appellant anterior to his acquiring the Sabin title. Wattles therefore had a perfect right, at the time he made the assignment, to pass the mortgage as to this portion of the premises, to the appellant. And that right, having been thus fairly and legally acquired, in the ordinary course of business, should not be defeated, or at all affected, by a subsequent conveyance from Sabin to Wattles, to which the appellant was an utter stranger, unless, in order to protect himself against an innocent purchaser, he was bound to register the assignment.

I am of opinion that the appellant was not bound by any rule of law, however prudent it might have been, to record the

assignment of the mortgage. It is not embraced in the words of the act relative to military titles; for the premises in question are not included in the military bounty lands, as was assumed by his honor the chancellor. Nor was the appellant bound to give notice of the assignment to any person but the mortgagor. The case of *Williams v. Gorsell*, 4 Ves. 389, relates only to dealings between mortgagor and mortgagee, before notice of assignment, and has no application to dealings between mortgagee and third persons, who are not parties to the original contract. The moneys, therefore, that might arise from the sale of that portion of the mortgaged premises, or so much thereof as would amount to a ratable proportion, ought, in my judgment, to have been awarded to the appellant.

Much has been said on the subject of the appellant's prior judgment. In answer to that, I will only remark, that if any reliance is to be placed on the validity of that judgment, the appellant has a clear and certain remedy at law to enforce it, and ought not to ask this court or the court of chancery to aid him for that purpose.

I am of opinion that the decree of his honor the chancellor should be reversed, so far as it respects that portion of the premises purchased by Sabin, and affirmed as to the residue.

BRONSON, CLARK, EASTON, LYNDE, MCINTYRE, OGDEN, THORN, and WHEELER, senators, concurred.

BOWKER, and WOOSTER, senators, were for affirming the chancellor's decree.

A majority of the court being for the reversal of the decree, the following rule was thereupon entered:

This case having been heard, and due deliberation being thereupon had, and the bill, as to the defendant, Caleb Johnson, having been taken *pro confesso*: It is ordered, adjudged and decreed, that the decree of the court of chancery of the twenty-eighth day of October, A. D. 1822, be, and the same is, hereby reversed and vacated. And it is further ordered, adjudged and decreed, that it be referred to one of the masters of the said court, to ascertain and report the balance justly due for principal and interest, upon the mortgage from the defendant, Caleb Johnson, to James O. Wattles, mentioned in the pleadings in this cause, and also the balance justly due to the appellant, for principal and interest, on the bond from James O. Wattles to the appellant, also mentioned in the pleadings in this cause.

And it is further ordered, adjudged and decreed, that upon the coming in and confirmation of the said report, the mortgaged premises, as the same are described in the said mortgage from the defendant, Caleb Johnson to the said James O. Wattles, to wit: All that certain piece or parcel of land (describing the mortgaged premises), or so much thereof as may be requisite, be sold at public auction at the court-house in the county of Onondaga, or on the premises, by any one of the masters of the said court of chancery, the said master giving six weeks public notice of the time and place of such sale, by an advertisement, containing a brief description of the said premises, to be inserted in a public newspaper printed in the said county, and a copy thereof to be affixed on the outer door of the said court-house; and, further, that the master making such sale execute to the purchaser or purchasers of the said premises, a good and sufficient deed or deeds of conveyance for the same, and out of the proceeds of such sale, pay to the solicitor of the appellant, the appellant's costs in the court of chancery to be taxed, and also the balance so reported to be due to him, upon the aforesaid bond and judgment, with interest from the date of the report, taking receipts for such payments, and filing the same with the report of such sale; and that he bring the residue of the proceeds, if any there be, into the said court of chancery, to be applied under the order of the said court, towards the payment of any balance, to be ascertained as the said court shall direct, that may be found due to the respondent, Davenport Morey, from the said James O. Wattles; and that the master make report of his proceedings in the premises, with all convenient speed.

And it is further ordered, adjudged and decreed, that the said Caleb Johnson and Davenport Morey, on the request of the complainant or his solicitor, or of the purchaser or purchasers of the said mortgaged premises, deliver over all deeds, demises or writings, whatever, relating to or concerning the said mortgaged premises.

And it is further ordered, adjudged and decreed, that the said Davenport Morey, and all persons claiming under him, or who have come into the possession of the mortgaged premises, *pendente lite*, deliver and yield up the possession thereof to the complainants, or to whomsoever shall become the purchaser or purchasers thereof at said sale, on his, her or their producing to the said Davenport Morey, or to the person or persons in the possession of the said mortgaged premises, the deed executed

by the master pursuant to such sale, as aforesaid, or that, in default thereof, a writ or writs of execution issue, for the purpose of putting such purchaser or purchasers into such full and peaceable possession.

And it is further ordered, adjudged and decreed, that the record and proceedings be remitted to the court of chancery, that this decree may be fully executed.

MERGER.—The doctrines of the principal case concerning the merger of the legal and equitable estates when the mortgagee becomes the owner of the equity of redemption, have been very frequently referred to and approved: *Russell v. Austin*, 1 Pai. 95; *Casey v. Buttolph*, 12 Barb. 639; *Reed v. Latson*, 15 Id. 14; *Clift v. White*, 15 Id. 75; 12 N. Y. 525, 535; *Spencer v. Ayrault*, 10 Id. 204; *Michles v. Townsend*, 18 Id. 582; *Champney v. Coope*, 32 Id. 548; *Bascom v. Smith*, 34 Id. 329; *Mason v. Lord*, 40 Id. 489; *Skeel v. Spraker*, 8 Pai. 186; *Roberts v. Jackson*, 1 Wend. 484; *Pelletreau v. Jackson*, 11 Id. 115; *Averill v. Wilson*, 4 Barb. 191; see, also, note to *Hitchcock v. Harrington*, 5 Am. Dec. 233. The principles established by these decisions are: 1. That "in law a merger always takes place when a greater estate and a less coincide, and meet in one and the same person, in one and the same right, without any intermediate estate:" Jones on Mort., sec. 848; 2. That while this rule is inflexible at law, it is not so in equity; 3. That equity will treat the estates as separate where it is shown that the party intended that they should be so kept; and, 4. That the intent of the party to keep the estates distinct, will be presumed whenever it was to his interest to so keep them, although his actual intent is not shown, or although from infancy, idiocy, or from some other cause, he was incapable of forming any intent, or of understanding his own interests: See Jones on Mort., secs. 848-873.

UNAUTHORIZED RECORDING OF INSTRUMENTS.—If an instrument be of a character which the statute does not authorize to be recorded, or if it is not entitled to record by reason of a defective acknowledgment, or of some other informality, then the recording of it does not impart constructive notice of its contents to anybody: *Heister's lessee v. Fortner*, 4 Am. Dec. 417; note to *Beekman v. Frost*, 9 Id. 254; *Williams v. Birbeck*, Hoff. Ch. 369; *Wolcott v. Sullivan*, 1 Ed. Ch. 408; *Carl v. Bird*, 10 Pai. 435; *Wetmore v. Roberts*, 10 How. Pr. 54; *Stoddard v. Rotton*, 5 Bosw. 383; *Villard v. Robert*, 1 Strob. Eq. 393; *Parrett v. Shaubhut*, 5 Minn. 323; *Washburn v. Burnham*, 63 N. Y. 132; *Jones v. Roberts*, 65 Me. 273; *Mesick v. Sunderland*, 6 Cal. 297. But it may happen that while the instrument is not entitled to record, the record thereof may nevertheless be seen and examined by persons intending to become purchasers of the property. In such a case does the record give actual notice of the contents of the deed to those who examine it? The better opinion is that it does give such notice. When this question arose in New Hampshire, Perley, J., speaking for the superior court of judicature, said: "As the deed in this case was not executed according to the statute, the registration as such is inoperative; that is to say, the registration is not constructive notice of the conveyance. But if by means of that registration of the defective deed, the defendants had actual notice of the plaintiff's title, they are charged with notice as in other cases. The defendants, when they found the copy of the plaintiff's deed on record, must have understood that the intended record was to give information that such a deed had been made, and that the plaintiff claimed land under it. This must be regarded as actual

notice, such as every reasonable and honest man would feel bound to act upon:" *Hastings v. Cutler*, 4 Fost. 483; *Musgrove v. Bonser*, 5 Or. 313; 20 Air Rep. 737; *Musick v. Barney*, 49 Mo. 458; see, also, *Gilbert v. Jess*, 31 Wis. 110. *Contra*, *Kerns v. Swope*, 2 Watts, 75.

RECORDING DEED INTENDED AS A MORTGAGE.—The authorities sustain the proposition that an instrument must be recorded according to its real rather than its apparent character. Therefore, it is said that a deed absolute upon its face, but intended as a mortgage, does not impart notice to subsequent purchasers, if recorded in the book of deeds: *White v. Moore*, 1 Pai. 551; *Brown v. Dean*, 3 Wend. 208; *Dey v. Dunham*, 2 Johns. Ch. 182; *Manufacturers' Bank v. Bank of Penn.*, 7 W. & S. 335; *Friedly v. Hamilton*, 17 S. & R. 70; *Jacques v. Weeks*, 7 Watts, 261; *Edwards v. Trumbull*, 50 Pa. St. 509; *McLanahan v. Reeside*, 9 Watts, 508; *Grimstone v. Carter*, 3 Pai. 421; *Jackson v. Van Valkenburg*, 8 Cow. 260; *Shaw v. Wiltshire*, 65 Me. 485. So in *Purdy v. Huntington*, 42 N. Y. 343; S. C., 1 Am. Rep. 532, it was said that if a conveyance made by a mortgagee, was intended as an assignment of a mortgage, it could not operate as such against subsequent purchasers without actual notice, if recorded in the book of deeds.

ASSIGNMENT OF MORTGAGE, NOTICE OF.—When a mortgage is assigned, actual notice thereof should be given to the mortgagor, otherwise he will, at least in New York, be protected in payments made to the mortgagee, although the assignment is, by the laws of the state, entitled to record and is duly recorded: *Ely v. Scofield*, 35 Barb. 330; *N. Y. Life Ins. & T. Co. v. Smith*, 2 Barb. Ch. 82. Statutory enactments in most of the states regulate this matter, the majority of them making the record of the assignment constructive notice against subsequent purchasers and incumbrancers only, leaving the mortgagor free, except when the mortgage is security for a negotiable note, to make payments to the mortgagee until he has actual notice of the transfer: *Jones on Mort.*, secs. 472-474.

ASSIGNMENT OF MORTGAGE, RECORD OF.—"The only effect of recording an assignment is, to protect the purchaser against a subsequent sale of the mortgage by the apparent holder of it: *Crane v. Turner*, 67 N. Y. 437; *Van Keuren v. Corkins*, 66 Id. 77. As against subsequent purchasers of the premises, or holders of subsequent mortgages upon them, the record of a prior mortgage is sufficient notice of its existence, without the record of an assignment of the mortgage to one who has purchased it. The failure to record the assignment does not blot out the record of the mortgage itself: *Campbell v. Felder*, 3 Keyes, 174; 1 Abb. App. Dec. 295. If the premises are conveyed to the mortgagee after he has assigned the mortgage, there is no merger of the mortgage title:" *Jones on Mort.*, sec. 474. A mortgagee first sold the mortgage and then bought the equity of redemption, and the assignment of the mortgage not being recorded, thus became the apparent owner of both estates. He then sold the property to a purchaser in good faith, for value, who had no notice of the assignment. The purchaser, it was nevertheless decided, held the property subject to the mortgage; for the latter instrument being recorded and not satisfied on the records, it was the duty of the purchaser to make inquiry concerning its ownership: *Purdy v. Huntington*, 42 N. Y. 334; S. C., 1 Am. Rep. 532.

ASSIGNMENT WHEN SUBJECT TO EQUITIES.—The rule maintained in the principal case that the assignee of a mortgage takes it subject to equities then existing against the mortgagee, and in favor of the mortgagor, has been frequently reaffirmed and enforced; *Stafford v. Van Rensselaer*, 9 Cow. 319;

Pitcher v. Carter, 4 Sandf. Ch. 19. But the authorities generally affirm that the mortgage is a mere incident, existing for the security of a debt; that it cannot be assigned without assigning the debt; that the assignment of the debt necessarily transfers the security, and that its payment discharges the security. If the debt and the security are thus inseparable, it would seem that the latter must share the fate of the former, and must continue operative as long as the former can be enforced. Negotiable promissory notes before maturity may be transferred to purchasers thereof in good faith, for value. If so transferred, they are not subject to any equities against the maker of which the purchaser had no notice. Does a negotiable note lose any part of its negotiability by being secured by a mortgage? If not, is there any reason why the mortgage should not be available to secure the payment of any judgment which may lawfully be recovered upon the note? We think that reason and authority must answer both these questions in the negative, and declare that the assignee before maturity of a negotiable note secured by mortgage may enforce the mortgage irrespective of any equities existing in favor of the mortgagor, but of which the assignee had no notice: *Carpenter v. Longan*, 16 Wall. 271; *Kenicott v. Supervisors*, Id. 452; *Sawyer v. Prickett*, 19 Id. 166; *Pierce v. Fausace*, 47 Me. 507; *Bloomer v. Henderson*, 8 Mich. 395; *Jones v. Smith*, 22 Id. 360; *Helmer v. Krolick*, 36 Id. 371; *Kelly v. Whitney*, 45 Wisc. 110; *Updegraff v. Edwards*, 45 Iowa, 513; *Farmers' N. B. v. Fletcher*, 44 Id. 252; *Duncan v. Louisville etc.*, 13 Bush, 378; *Billgery v. Ferguson*, 30 La. An. 84; *Logan v. Smith*, 62 Mo. 455; *Taylor v. Page*, 6 Allen, 86. The following cases, however, proceed upon the theory that the assignee holds subject to the equities existing in favor of the mortgagor at the assignment, notwithstanding the fact that the mortgage was given to secure a negotiable note, and the same was not yet due: *Johnson v. Carpenter*, 7 Minn. 176; *Hostetter v. Alexander*, 22 Id. 559; *Bryant v. Viz*, 83 Ill. 11; *Walker v. Dement*, 42 Id. 273; *Baily v. Smith*, 14 Ohio St. 396; *Corbett v. Woodward*, 11 Chicago L. N. 246.

The principal case has been approvingly cited to show that a mortgage cannot, by a subsequent parol agreement, be made to secure advances: *Walker v. Snedicker*, Hoff. Ch. 146; *Diver v. McLaughlin*, 2 Wend. 599; that a mortgage to secure future advances is valid: *Mead v. York*, 6 N. Y. 451 (see on this point the note to *Pettibone v. Griswold*, 10 Am. Dec. 106); that a deed, absolute on its face, may, by parol, be proved to be a mortgage: *Walton v. Cronly*, 14 Wend. 66; that the conveyance by the mortgagee of a part of the mortgaged premises is not an irrevocable election that the mortgage and the equity of redemption shall be merged: *Oliff v. White*, 12 N. Y. 528.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

REW v. BARKER.

[2 COWEN, 408.]

AMENDMENT OF RECORD AFTER APPEAL may be made in the lower court.

SPECIAL VERDICT may be amended by correcting a mistake in a date, after an appeal or writ of error prosecuted to the appellate court, and a joinder in error there, and several notices of argument.

DIMINUTION OF THE RECORD cannot be alleged after joinder in error in the appellate court.

ERROR from the common pleas, and issue joined in this court *in nullo est erratum*. The action was on a breach of warranty of title to a horse sold by Rew to Barker. The latter obtained a judgment below, and a motion for a new trial on a case stated, was denied. The case was, by leave, turned into a special verdict, on which the writ of error was brought. In making up this verdict, the date of the sale of the horse was, by mistake, stated to be on the nineteenth of November, 1819, whereas it should have been on the nineteenth of November, 1818. The cause had been several times set for argument, but upon discovering this mistake, the defendant in error moved for and obtained an amendment in the court below.

S. A. Foot, in support of a motion to amend the return so as to correspond with the amended verdict below, cited 2 Danl. Pr. 703; and *Tillotson v. Cheetham*, 3 Johns. 95.

S. Van Rensselaer, contra, urged that a writ of error to an inferior court removed the record in judgment of law: 2 Tidd. 1089, 1090; 3 Johns. 444; 3 Cai. 86, 87; and that, therefore, nothing remained in the lower court which it could amend;

that it was too late to move in this respect after issue joined; and that the negligence of the defendant deprived him of the right to amend.

By COURT. The delay of making this motion is fully accounted for, and the objection of laches fails. It is true, as contended, that here is a joinder in error, which admits the return to be perfect. It is, therefore, too late to allege diminution, and no certiorari can be awarded. But that objection does not reach the case. The office of a certiorari is to bring up matter of record omitted in the return. The object here is to amend, by the alteration of a date, in such a manner as plainly to subserve the ends of justice, and we think the case of *Tully v. Sparkes*, 2 Ld. Raym. 1570; 2 Str. 369, fully justifies the motion. That case was error from the K. B. to the exchequer chamber. A motion was made in the latter court, for leave to amend imperfections in the record. They refused this in the first instance, but gave time for applying to the K. B., which amended; and the exchequer chamber afterwards made a corresponding amendment in the transcript, and this too, after a joinder in error and argument in that court. It is said the court below could not amend, because the record was brought up by the writ of error. But this is not so. For the purposes of amendment it remains in the court below, and the exchequer chamber considered it so in *Tully v. Sparkes*, and proceeded accordingly. This case, with others to the same point, are cited as sound law, in *Tillotson v. Cheetham*, 3 Johns. 75 [3 Am. Dec. 459]. The court below have amended as in *Tully v. Sparkes*. But suppose the record here, we would amend it ourselves: *Pease v. Morgan*, 7 Johns. 468. The principle of this case was acted upon in *Price v. McEvers*, Col. Cas. 41, in the court of errors. The inaccuracy of the special verdict arises from the mere oversight of the judge in the court below. It comes within the very common principle of amendments, that it is a mistake of an officer, and the motion must be granted.

Rule accordingly.

AMENDMENTS AFTER APPEAL.—In the case of *Bramlett v. Pickett*, 12 Am. Dec. 350, and the note thereto, the power of courts to amend decrees and judgments, by the correction of clerical errors therein, is considered. In the above case of *Rew v. Barker*, there are three peculiar features: 1. The amendment was made while the cause was pending in the appellate court; 2. The amendment was not of a judgment, but of a record anterior to the judgment; and, 3. The amendment was of so substantial a character as to occasion the affirmance of a judgment which would otherwise have been reversed.

That an amendment of a record may be made while the cause is pending in another court, on appeal or writ of error, is unquestionable. The amendment cannot be made by the appellate court, because the original record remains below. The application to amend must necessarily be made, notwithstanding the appeal, to that court in which the original record is; and that court will grant the relief sought in all instances where the granting of it would be proper had no appeal been taken: *Attorney-general v. White*, Bunb. 283; *Doe v. Perkins*, 3 T. R. 749; *Buckman v. Whitney*, 24 Cal. 267; *Petre v. Hannay*, 3 T. R. 659; *McNeil v. Arnold*, 17 Ark. 154; *Tillotson v. Cheetham*, 3 Johns. 95; *Tully v. Sparkes*, 2 Id. Raym. 1507; *Bank v. Lyles*, 10 G. & J. 326; *States v. Campbell*, 7 Cow. 425. The amendment may be made not only while an appeal is pending, but even after the decision of the cause by the appellate court. In *Day v. Wilbur*, Col. & C. Cases, 406, a judgment had been reversed. An application was then made for an amendment, which would, if made, avoid the point on which the reversal was ordered. A stay of proceedings was ordered, and notice given the respondent to show cause against the amendment. When the time for showing cause came, the rule for the amendment was made absolute: *Day v. Wilbur*, 2 Cai. 375. In *Lynes v. Noble*, 1 How. Pr. 226, the bill of exceptions was amended in order to supply a defect, on account of which the case had been determined. In *Dunbar v. Hitchcock*, 3 Maule & S. 591, error had been brought from the C. B. to the K. B. A decision was had in the K. B., and an appeal was taken thence to the house of lords. It was then found that an error had crept into the record in the C. B., and also in the K. B. A rule having been obtained for amending these errors, Lord Ellenborough, C. J., said: "I find, by reference to the minutes of proceedings in this court, that this court is in the habit of granting leave to make this sort of amendment. I find that it is ordered thus: 'Let it be referred to Mr. _____, to amend the record according to the several proceedings in the inferior court, to be pursued by him.' So that, it appears, in that instance the court, in the exercise of its discretion, ordered the materials to be brought before them, in order to make the amendment. Whether the transcript be carried to the house of lords or not, if in this case the amendment is warranted by the statutes of amendments, it is our duty to make such amendment." In *Richardson v. Mellish*, 3 Bing. 346; 11 Moore, 119; 7 B. & C. 819, an appeal had been taken from the C. B. to the K. B., and a decision had been made in the last named court because it appeared that the verdict had been taken on all the counts, when, by reference to the *postea*, it appeared that the verdict was taken only on the first count. An application having been made in the lower court to amend, Best, C. J., said: "If we do not make the amendment, the court of the king's bench must give judgment on a false record, and on the miserable technical objection that, Lord Mansfield lamented, was a tenable one, namely, that some of the counts to which the attention of this court was not called, are bad. We are doing what will enable the court of king's bench to do justice. I have no doubt that the king's bench will suspend judgment, but should we be disappointed in this, and the defendant in error, instead of taking a *venire de novo*, brings a writ of error, it will be our duty to certify to the house of lords, as the court of king's bench did in *Dunbar v. Hitchcock*. that the record sent to that house is a defective record, which will enable the house of lords to set this matter right."

A very full report of this case can be found in 14 E. C. L. Rep. 366. The order entered by the court is given in full on page 373 of said report. When an amendment is made in the lower court, the record, as amended, must be

certified to the appellate court, and thereupon the record in the last named court will be made to conform to the amended record: *Jones v. Van Patten*, 3 Ind. 107; *Colerick v. Hooper*, 3 Ind. 316; *Freel v. State*, 21 Ark. 226.

The rules applicable to the amendment of sheriff's returns and other records are discussed in a note to *Malone v. Samuel*, 3 A. K. Marsh. 350 [13 Am. Dec. 172], as well as in *Bramlett v. Pickett*, 12 Id. 350. The principal case, now under consideration, is an illustration of the power of courts to amend records made anterior to the entry of the judgment, and necessary to its support. Numerous other and similar illustrations may be cited. In the case of *Freel v. The State*, 21 Ark. 226, judgment had been rendered against Mrs. Freel, on an indictment for murder. An appeal therefrom was taken to the supreme court, and a writ of error and supersedeas awarded. It was then ascertained that the record stated that the deceased was killed on a day subsequent to that on which the indictment was found. "On motion of the attorney-general, the prisoner was brought into the court below, and the error in the bill of exceptions, as to the time the offense was committed, was corrected, the error having occurred not in the testimony, but in drafting the bill of exceptions." In the case of *States v. Campbell*, 7 Cow. 425, the attorney made a mistake in drawing the *postea*. An amendment was subsequently ordered, pending the prosecution of a writ of error.

A judgment may, pending an appeal therefrom, be amended in the court which pronounced it, if the circumstances are such as to warrant the amendment, if no appeal had been taken. The judgment may thereby be freed from error: *Cunningham v. Fontaine*, 25 Ala. 644; *Dow v. Whitman*, 36 Id. 604. The appeal, if further prosecuted, must be treated as an appeal from the judgment or decree as amended: *Hunt v. Wallis*, 6 Pai. 371. And where it is clear from the record that the error in the judgment is a mere clerical misprision, the judgment will not be reversed, but will be amended to conform to what the record shows ought to have been the entry in the first instance: *Tryon v. Sutton*, 13 Cal. 490; *Browner v. Davis*, 15 Cal. 9. For other cases affirming the power of courts of record to amend their records on proper data at any time, so as to make them speak the truth, see *Lippincott v. Wygant*, 2 Ind. 661; *Hollister v. The Judges*, 8 Ohio St. 203; *Anderson v. Parker*, 6 Cal. 201; *Swain v. Naglee*, 19 Cal. 127; *Hegeler v. Henckell*, 27 Cal. 495; *Morrison v. Dapman*, 3 Id. 255; *Branger v. Chevalier*, 9 Id. 172; *Schroeder's Estate*, 46 Id. 316; *Bank of United States v. Moss*, 6 How. U. S. 38; *Finnell v. Jones*, 7 Bush, 359; *Burson v. Blair*, 12 Ind. 371; *Sprague v. Jones*, 9 Pai. 395; *Doane v. Glenn*, 1 Col. 456; *Huntington v. Zeigler*, 2 Ohio St. 10.

AMENDING VERDICTS.—The right to amend verdicts by reference to the record has always been conceded: *Rockefeller v. Donnelly*, 8 Cow. 623; *Roulain v. McDowall*, 1 Bay, 490; *Goodtitle v. Otway*, 8 East, 357; *Updegraff v. Judges*, 3 Cow. 31. "I admit that extreme caution should be used in allowing such amendments. Where the slightest doubt exists as to the real intention of the jury, their verdict ought not to be changed. But where no such doubt exists it would be an unnecessary obstruction to the administration of justice to refuse such an amendment. When mistakes occur, and occur they will and do, every court will feel bound, so far as practicable, without injustice to any one, to correct them:" *Harris, J., in Burnham v. Tibbits*, 7 How. Pr. 21, citing *Van Rensselaer v. Platner*, 2 Johns. Ca. 17; *Beekman v. Bemus*, 7 Cow. 29; *Jones v. Kennedy*, 11 Pick. 125; *Clark v. Lamb*, 8 Pick. 415; *Scott v. Galbraith*, 1 Dall. 134.

SNYDER v. WARREN.

[2 COWEN, 518.]

REDEMPTIONER BY JUDGMENT.—A judgment upon full consideration entitles the judgment-creditor to the privileges of a redemptioner, though entered solely for the purpose of giving him the right to redeem.

REDEMPTION, COMPUTATION OF TIME FOR.—The time for redemption is computed by allowing the full number of calendar months from the day of the sale.

MOTION for a mandamus. Under a judgment of the common pleas in favor of J. G. & H. Snyder against Barnard Wagar for one thousand five hundred and seventy-five dollars and ten cents, a *fi. fa.* issued, and on the fifteenth of August, 1822, a farm belonging to Wagar was sold by the sheriff for eight hundred and eighty-eight dollars, and bought by the Snyders, to whom a certificate of sale was issued. On the fifteenth of November, 1823, one De Freest applied to the sheriff to redeem the farm sold to the Snyders, basing his right on the ground that he was a judgment-creditor of Wagar, and offered the sheriff the amount bid by the Snyders, and ten per cent. interest. It appeared that the judgment recovered by De Freest was confessed by Wagar for the sum of seven dollars and twenty-seven cents, a balance due, and was so confessed on the fourteenth of November, 1823, to enable De Freest to redeem the farm. For the privilege of redeeming, De Freest offered Wagar eighteen hundred dollars. De Freest, learning that he could not redeem on so small a judgment as seven dollars and twenty-seven cents, it not operating as a lien on Wagar's lands, advanced the latter eighteen dollars, which, together with the judgment, formed the amount on which the right of redemption was claimed. On the twentieth of November, 1823, the Snyders called on the sheriff for a conveyance, and upon his refusing to execute one, by reason of De Freest's claim to redeem, this motion for a mandamus was made to compel the execution of such conveyance.

J. P. Cushman, in support of the motion, contended that the confession of the judgment with the express view to enable the creditor to redeem was a fraud, and that the fifteen months provided by statute within which a redemption might have been made, had expired.

J. Paine, contra.

By Court. We do not consider it a valid objection that this

judgment was entered for the express purpose of enabling De Freest to redeem. It was upon full consideration. The debtor may confer the power of redeeming upon as many as he pleases. It keeps up the auction, and is thus directly within the policy of the statute. We are clear that the fifteen months intended by the statute are calendar lunar months. The second section is in terms of calendar time. It speaks of a year for the debtor; and then the third section extends that time three months in favor of the creditor. The creditor had the whole of the fifteenth of November in which to redeem.

Motion denied.

THE PEOPLE v. KINGSLEY.

[2 COWEN, 522.]

INDICTMENT FOR FORGING A LOST INSTRUMENT, or an instrument in the possession of the accused, is sufficient if it describe the instrument in general terms, and set forth the excuse for not setting out a copy, or describing the instrument more particularly.

FORGERY—EVIDENCE.—On the trial of an indictment for forgery, if it appear that the instrument is lost, destroyed, or in the possession of the accused, secondary evidence may be given of its contents.

MOTION in arrest of a judgment rendered against the defendant, on an indictment for having feloniously forged a bond, with intent to defraud one John Sinclair. The indictment charged the forging of a bond in the defendant's possession, of the date, for an amount, upon conditions, and at a rate of interest all unknown to the jurors, purporting to be executed by one Bockhoven to the defendant, with the intent to defraud one John Sinclair. It appeared from the certiorari by which the cause was removed to this court, that on the trial the counsel for the people notified the defendant to produce the bond; that the bond was not produced; and that thereupon witnesses were called who established clearly the forging of a bond against Bockhoven, which defendant attempted to sell to Sinclair.

M. Hoffman, in support of the motion in arrest, urged that the indictment should set forth an exact copy or its purport, so that on its face it may appear to be susceptible of forgery: 1 Chit. C. L. 234; 3 Id. 1040 and cases cited; 2 East, C. L. 975, 985, secs. 53, 28, etc.; *People v. Franklyn*, 3 Johns. Cas. 299; *State v. Gustin*, 2 South. 744.

Talcott, Attorney-general, *contra*, relied upon *Commonwealth v. Ross*, 2 Mass. 373; and *Commonwealth v. Houghton*, 8 Id. 107.

By Court. The evidence of this crime was most clear; and the only question is, whether the indictment is sufficiently certain to warrant us in giving judgment. The indictment excuses the want of a more particular description, by averring that the bond was with the defendant. There is no doubt of the general rule that the instrument forged must be set forth with particularity and certainty; but to require this unqualifiedly in all cases, without exception, would result in a failure of public justice. We think *The Commonwealth v. Houghton*, presents the true distinction. "There are cases," says Judge Sedgwick, "which will form just and necessary exceptions to this rule; as where the instrument forged has been destroyed by the prisoner, or had remained in his possession," etc. "But," he continues, "in every such instance, that the exception may be admitted, it must appear in the indictment what is the cause of the non-description of the instrument," giving the present case precisely.

The general proposition, so often repeated in the books, that the instrument must be produced in evidence is no more than the rule on the civil side, that the best evidence the nature of the case admits must be produced. The rule always yields, where the instrument is either lost, destroyed, or, as here, in the hands of the opposite party. This exception underwent full consideration in *The Commonwealth v. Snell*, 3 Mass. 82, and the judges were unanimous in its favor.

The evidence that the bond continued in the defendant's possession was sufficient. He presented it to Sinclair, and after this we have no account of it.

Motion denied.

EX PARTE DEAN.

[2 COWEN, 605.]

TIME, HOW COMPUTED.—If, in a statute, time is to be computed from the doing of an act, the day on which it is done is excluded from the computation.

MOTION for a *mandamus* to compel the common pleas to quash an appeal taken from the justice's court, on the ground that the bond on appeal had not been executed within the four days allowed by statute. It appeared that the judgment in the justice's court was rendered on the twelfth of September, and on the same day the notice of appeal was given; but the bond was not executed until the sixteenth of that month.

The moving counsel urged that, when the computation of time is to be made from an act done, the day on which the act was done should be included in the calculation, citing *Rex v. Aderly*, Doug. 463; *Castle v. Burdett*, 3 T. R. 623; *Glassington v. Rawlins*, 3 East, 407.

By COURT. We have departed from the rule of construction adopted by the English courts, and hold that the same mode of computation is to be adopted upon statutes which prevails both in England and in this state as to notices; that is to say, one day is to be counted inclusive and the other exclusive. We held this at the last term, upon the statute (Sess. 43, ch. 184, s. 8,) in relation to the sale and redemption of lands upon execution, which gives to the judgment-creditor fifteen months from the sale within which he may redeem. Where the sale was on the fifteenth of August, 1822, we gave the creditor the whole of the fifteenth of November, 1823, to redeem.

But, without resorting to this rule of construction, we think the particular words of the statute under consideration, show an intention in the legislature to exclude the first day. These are, that the party appealing shall, at the time of rendering such judgment, or within four days thereafter (that is, after the time of rendering judgment, which is legally the day of rendering it, and thus the day is excluded), serve the justice, personally, with a notice in writing, etc.: Sess. 41, ch. 84, s. 17. To exclude the first day would, moreover, we believe, accord with the uniform practice under this statute.

Motion denied.

Followed in *People v. Whaley*, 6 Cow. 660; *Commercial Bank v. Ives*, 2 Hill, 356; *Fairbanks v. Wood*, 17 Wend. 331; *Elmendorff v. Mayor of New York*, 25 Id. 697; *Cornell v. Moulton*, 3 Denio, 16.

COMPUTATION OF TIME.—See *Avery v. Stewart*, 7 Am. Dec. 239, and note.

COX v. JAGGER.

[2 COWEN, 638.]

ARBITRATION, WHAT MAY BE SUBJECT OF.—Parties who are competent to transfer real property, or exercise acts of ownership over it, may refer their disputes concerning it, to arbitrators. A claim to dower may, therefore, be submitted to arbitrators.

AN AWARD is not valid where it is beyond the scope of the submission, but may be valid in part, and void in part.

AWARD, OPERATION OF ON LAND.—An award cannot operate as a conveyance of realty, but it may estop the party against whom it was rendered from disputing the title of his adversary.

RIGHT TO DOWER, until legally assigned, is a right resting in action, only.

An award against the claimant may extinguish it.

AWARDS MUST BE FINAL, so as to end the litigation.

AWARDS, HOW CONSTRUED.—If two parts of an award are irreconcilable, the first prevails.

DOWER, by the widow of John Cox, deceased. Plea, that the demandant's husband and son, Alexander, being seised in fee-simple of the premises in question, conveyed the premises to the tenants in the husband's life-time; that after his decease, Alexander and the demandant submitted to arbitration the sum which Alexander should annually pay demandant in lieu of her dower, which she agreed to release upon the fulfillment of the award by Alexander; that an award was made by arbitrators chosen, directing that all suits, quarrels and controversies touching the premises in question should cease and be no further prosecuted; that Alexander or the tenants should pay to the demandant the annual sum of thirty-five dollars in quarterly installments of eight dollars and seventy-five cents each, in lieu of her right of dower, and that, in case the said installments were not so paid, it should be lawful for the defendant to enter upon the premises in and for her right of dower in the same manner as if the award had never existed. The plea then alleged payment and performance of the award on the part of Alexander and the tenants. Demurrer to this plea and joinder.

McKissock, in support of the demurrer, contented that the award was no bar to the action of dower: Rol. Ab. Arbitrement, B. pl. 7; Com. Dig. Arbitrement, D. 3; 3 Bl. Com. 16; that it was void, for not having ordered a release of dower: *Johnson v. Wilson*, Willes, 218; that it was uncertain, and that it purported to bind persons, strangers to the submission.

C. H. Ruggles, contra.

WOODWORTH, J. The law is well settled, that where the parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement: *Kyd on Awards*, 61. The demandant's claim of dower being a proper subject of submission, the inquiry will be whether the award is a bar to the action. The submission and award are set out in the plea, with an aver-

ment that after publishing the award, Cox tendered the costs, and paid to the demandant two quarters of the yearly allowance. The authority given to the arbitrators cannot be extended to persons or things beyond the scope of the submission. An award may be good in part and bad in part, where that part which is void is not so connected with the rest as to affect the justice of the case. It is then void only *pro tanto*: *Martin v. Williams*, 13 Johns. 264.

It is contended that the award is defective in not having directed a release of dower. To this it may be answered that the demandant, by the submission, bound herself, on the fulfillment of the award, to release her dower and damages. This act being provided for by the parties, it became unnecessary for the arbitrators to direct a release. It will be seen that their powers were confined to two objects: the sum to be paid, and the security to be given. Having disposed of these, there was a compliance with the terms of the submission. But, independent of this, I do not think the omission fatal, for they award that all suits touching the premises shall cease, and that the yearly sum of thirty-five dollars is in lieu of the right of dower. If, then, in consequence of the award, the demandant could not maintain an action, the effect, as it respects the defendants, is the same as if a release had been awarded and actually executed. They are equally protected. The principle upon which an award is held to be a bar, where the title to land is submitted, is, not that it can have the effect of conveying the land, but that the party is concluded, by his own agreement, from disputing the title.

The parties consent that the award shall be conclusive as to the right, and that is sufficient to bind them: *Doe v. Rosser*, 3 East, 16. In the case of *Sellick v. Adams*, 15 Johns. 197, the arbitrators fixed the boundary between the land of the parties. It did not appear that a release was awarded, yet the court held that the award would have been sufficient to enable the party to recover in ejectment; and in *Shepard v. Byers*, 15 Johns. 497, where the parties covenanted to execute releases according to the division to be made by the arbitrators, the doctrine is recognized, that though an award may not have the operation of the conveying the land, it may estop a party from setting up his title. It has been adjudged, that when it is awarded that one party shall pay money or deliver up any particular thing in satisfaction of actions and suits, the court will imply a release from the other party to be intended by the arbitrators:

Mawe v. Samuel, 2 Rol. 1; 12 Mod. 234; Caldwell on Arbi. 129. It has also been held that where anything is awarded in satisfaction, there the award itself is a bar before it is performed: Cold. 212; Carth. 378; Ld. Raym. 247; Salk. 69.

But, on another ground, I think this objection cannot prevail. The right to dower until it is legally assigned, is a right resting in action only. The widow may release her claim, but she cannot invest another person with the right to maintain an action for it: 1 Cruise's Dig. 159, s. 2; 17 Johns. 68; 20 Id. 413. It seems to me of necessity to follow, that the award operates as an actual extinguishment of the right resting in action, when it declares that the action itself shall not be prosecuted, and that the money is in lieu of the claim. I do not perceive that the award is void for uncertainty.

It is explicit as to the payment of the money. As to the security intended to insure the regular yearly payments, there is some obscurity; yet it is sufficiently plain to show what the arbitrators intended the demandant should rely on. They considered the money retained by the defendants as constituting her security. Whether that was adequate, or whether it could, in fact, be resorted to by the demandant, in case of a default, is not the question. If they misjudged on this point, it cannot affect the award. It was submitted to them to point out the security, in their judgment deemed sufficient. This has been done, and the demandant cannot now object to it. It is also urged, that the award is void, because it purports to bind persons strangers to the submission. It is undoubtedly void, so far as it requires the defendants to pay; but granting this, it does not affect its validity as to Alexander Cox. The award is, that Cox, or one of the defendants, or either of them, shall pay. It is within the rule recognized in *Martin and others v. Williams*.

It is also objected, that the arbitrators had no power to award as to costs. If that be granted, it cannot affect the residue of the award; for it is not connected with, but a distinct question from the one, whether the right of dower is barred. It may, too, be rejected as surplusage; for the submission provides that Alexander Cox shall pay all costs. It was evidently not intended that the costs should be under the control of the arbitrators. If, however, nothing had been said respecting costs in the submission, it was a power necessarily incident to the authority of the arbitrators. It was so decided in *Strong v. Ferguson*, 14 Johns. 161.

Every valid award must be final, so as to put an end to future

litigation. Here it is provided, that on the neglect or refusal to pay, the demandant may enter, as if the award had never existed. This provision is clearly bad. The first part of the award is final, for it awards the sum of money to be paid, and prescribes the security for performance. The latter part is repugnant to the former, and must be rejected; but the former part is valid. The rule is, that when there is any contradiction in the wording of an award, so that one part is irreconcilable with another, the first part shall prevail and the latter be rejected: 3 Bulst. 62; Pop. 15, 16; Cold. 130; Kyd, 216, 217. On the whole, I am of opinion that judgment on the demurrer be entered for the defendants.

Judgment for the tenants.

Cited to support the position taken in *Ville v. Troy & Boston R. R. Co.*, 20 N. Y. 191, that when arbitrators exceed their jurisdiction, and award upon matters not embraced in the submission, that portion of the award is void; and that where the award is entire, and the whole is effected by the excess of the jurisdiction, the whole award is void; and to the same point in *Nicholas v. Rensselaer Ins. Co.*, 22 Wend. 123. As showing that title to realty will not pass by an award, this case is cited in *Robertson v. McNiel*, 12 Id. 583.

IMPEACHING AWARDS.—See *Jocelyn v. McDonnell*, *post*.

BANK OF UTICA v. SMALLEY.

[3 COWEN, 770.]

TRANSFER OF STOCK.—If an act provides that a transfer of stock shall not be valid until registered on the books of the corporation, this provision is for the benefit of the corporation, and an unregistered transfer is valid between the parties thereto.

PROOF OF CORPORATION, WHEN REQUIRED.—When a corporation sues, and the general issue is pleaded, it must prove that it is a corporation.

INCORPORATION, AVERMENT OF.—A corporation, in suing, need not aver how it was incorporated.

MISNOMER OF A CORPORATION, plaintiff, is no ground for a nonsuit. It can be taken advantage of only by a plea in abatement.

ASSUMPT by the president and directors of the bank of Utica against the indorsers of a promissory note made by one Morse. The plaintiffs called one Colling as a witness, to whom the defendants objected on the ground that he was a stockholder in the Utica bank. This objection was sustained; whereupon witness immediately made an assignment of his stock to plaintiffs' counsel, who offered Colling again as a witness. Defend-

ants then objected to the witness on the ground that the transfer was not valid; not being made on the books of the company as required by the statute. The objection was overruled, and the witness testified to the demand, protest for non-payment, and notice. The plaintiffs' case then rested, and defendants objected to any recovery, for the reason that the plaintiffs had not proved themselves a corporation. This objection was overruled. Defendants then objected to a recovery on the ground that the plaintiffs were incorporated as "the president, directors and company of the bank of Utica," whereas the suit was in the name of "the president and directors of the bank of Utica." This objection was also overruled. Verdict for the plaintiffs, subject to the opinion of the court on all the questions arising in the cause.

H. R. Storrs, for the plaintiffs.

J. A. Spencer, *contra*.

SUTHERLAND, J. It is contended by the defendant: 1. That Thomas Colling was an incompetent witness, and was improperly admitted by the judges. The objection to Colling was, that he was a stockholder in the bank in whose name this suit was brought. He immediately assigned or transferred his stock, and was then permitted to testify. The transfer, it is said, was not valid, because it was not registered in a book kept by the company for that purpose, the sixth section of the act providing that no transfer of stock shall be effectual until it is so registered, and all debts due from the stockholder to the company are paid, etc. This provision was intended exclusively for the benefit and protection of the bank. Their lien upon the stock for any debts due them cannot be affected by a transfer of the stock; and the only notice of a transfer which they are bound to regard, is a registry of it in their books. Payment of dividends to the original stockholder at any time before the assignment was registered, would probably be good. The legislature intended by this section to afford to the bank a means of ascertaining with certainty who they were bound to consider and treat as stockholders. But if A., being a stockholder in the bank, and also indebted to the bank, transfer his stock to B., all his interest passes. It is a valid transfer as between A. and B., but B. takes it subject to the claims of the bank against A. The registry can be made as well by B. as by A. The transfer made by Colling, therefore, passed all his interest in the stock, and rendered him a competent witness.

2. It is contended that the judge erred in deciding that the plaintiffs were not bound to prove themselves a corporation upon the general issue pleaded. This objection is well taken. When a corporation sues they need not set forth by averment, in the declaration, how they were incorporated; but upon the general issue pleaded they must prove that they are a corporation: *Kyd on. Corp.* 292; *Norris v. Staps*, Hob. 211; 2 *Ld. Raym.* 1535; *Jackson ex dem. Trustees of Union Academy v. Plumbe*, 8 *Johns.* 378; *Dutchess Cotton Manufacturing Co. v. Davis*, 14 *Id.* 245, opinion of Thompson, C. J. [7 *Am. Dec.* 459]; *Bank of Auburn v. Weed*, 19 *Johns.* 300.

3. It is objected that the judge erred in overruling the objection to the plaintiff's right of recovery on the ground that the suit was brought in the name of the president and directors of the bank of Utica, whereas they were incorporated by the name of the president, directors and company of the bank of Utica. This was a mere misnomer; and a misnomer of a plaintiff, even in the case of a corporation, is not ground of nonsuit, but can be taken advantage of only by plea in abatement: 1 *Chit. on. Pl.* 440; 1 *Bos. & P.* 40; *Gardner v. Walker*, 3 *Anstr.* 935; *Com. Dig. Abatement, E*; 5 *Mass.* 97. The judge therefore decided correctly in overruling the objection.

4. It was objected that the note on which the suit was brought was usurious. There is nothing to distinguish this case, upon the question of usury, from those of the *New York Firemen Insurance Co. v. Ely and Parsons*, 2 *Cow.* 678, and the *Bank of Utica v. Wager*, *Id.* 712, except that the clerk who cast the interest swears "that it was his intention, as a clerk and bookkeeper, always to cast the interest at seven per cent. only, and according to the best and most approved system in use." This does not change the legal character of the transaction. It was his intention to cast and receive interest for ninety-one days, upon a forbearance of ninety, under an erroneous impression that ninety days were the legal fourth of a year. All that he means to say, then, is, that he supposed, for the purposes of interest, that the year consisted of three hundred and sixty days; and upon that supposition, considering ninety days as the fourth of a year would not give more than seven per cent. His mistake was as to the law, and not as to any matter of fact. Upon the principles already established in the cases alluded to, the transaction must be considered usurious, and there must be judgment for the defendant.

Savage, C. J., concurred, except as to the misnomer; and added that as to the competency of Colling, it appeared that he absolutely assigned his stock to the counsel in the cause. The objection urged against his competency is, that the transfer was not complete till entered on the books of the bank, which had a lien upon the stock for any debt due it from Colling; but it seems to me that this was a question to be agitated only between the bank and the purchaser. Colling had done all in his power to divest himself of the stock, provided his conveyance was valid. But as the conveyance was, for aught that appears in the case, without consideration, and evidently for the purpose of qualifying himself to be a witness, was it *bona fide*? Was not Mr. Williams a trustee for Colling? He (W.), having neither paid nor become obligated to pay C. for the stock. It is stated in this case that he transferred his stock, and I think we are, as was mentioned at the bar, to understand that the transfer was made in all respects regularly and fairly, except in the particular objected to at the trial. The objection of the misnomer seems to me well taken. Under issue joined, it was incumbent on the plaintiffs to show that they had a legal existence, and a capacity to sue. In attempting to do so, they prove, if anything, that "the president, directors and company of the bank of Utica" were incorporated, but the suit was brought in the name of "the president and directors of the bank of Utica." The defendants were not to know that there was no incorporation of that name. The name of a corporation is essential. They are authorized to sue by a particular name, and they certainly have no power to sue by any other. Suppose the cases put at the bar, that the president of the bank of Utica alone, or the directors and company, without the president, or the directors alone, or the company alone, had brought the suit, I should not hesitate in saying that such an action could not be sustained. The authorities cited to show that the defendant, if sued by a wrong name, must plead it in abatement, and cannot take advantage of this informality on the trial, prove to my mind the reverse of the proposition as to the plaintiff; and that a variance of this kind must be taken advantage of on the trial, especially where the plaintiff is a corporation. The case from Bosanquet & Puller may be law, if placed on the ground adopted by Buller, J., that the omission related to mere addition of place; but I do not comprehend how the rule that a corporation must prove its existence upon the general issue can, in general, be complied with, unless it

is confined to the name upon record. Under this rule its existence by the name becomes matter of substance. It is an artificial technical being, and the proceedings should conform to the idea throughout.

WOODWORTH, J., concurred in the result of these opinions.

Judgment for the defendants.

TRANSFER OF STOCK.—The requisitions generally found in the charters or by-laws of corporations, regarding the registry on the books of the corporation, of all transfers of stock, are construed in this country to be imposed rather for the protection of the company than as essential to the validity of the transfer, as between the immediate parties thereto. Upon this point the principal case is very extensively referred to; it is considered to have settled the law in this regard in New York: *Johnson v. Underhill*, 52 N. Y. 210; *Isham v. Buckingham*, 49 Id. 222; *McNeil v. Tenth Nat. B.*, 46 Id. 331; *Bank of Attica v. Mfg. and T. Bank*, 20 Wend. 511; *Orr v. Bigelow*, 14 Id. 560; *Adderly v. Storm*, 6 Hill, 628.

In *McNeil v. The Tenth Nat. B.*, *supra*, Rapallo, J., speaking for the court, says: "It has also been settled by repeated adjudications, that as between parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections;" citing the *Bank of Utica v. Smalley*; *Gilbert v. Manchester Co.*, 11 Wend. 627; *Kortright v. Com. Bank of Buffalo*, 22 Id. 362; *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 N. Y. 80. The same principle is affirmed in *Weston v. B. R. M. Co.*, 5 Cal. 188; *Bruce v. Smith*, 44 Ind. 5; *Chouteau Spring Co. v. Harris*, 20 Mo. 388; *Broadway Bank v. McElrath*, 13 N. J. E. (2 Beas.) 27; *Mt. Holly etc. T. Co. v. Ferree*, 17 Id. (2 C. E. Green) 119; *Pittsburgh etc. C. R. R. v. Clarke*, 29 Pa. St. 151; *Hoppin v. Buffum*, 9 R. I. 518; *United States v. Cutts*, 1 Sumn. 149; in each of which the principal case is approved.

Upon other questions of law, the *Bank of Utica v. Smalley* is quoted as authority. It is followed on the necessity of proving corporate existence under the general issue, in *Stoddard v. Onondaga etc. Co.*, 12 Barb. 575; *Waterville v. Bryan*, 14 Id. 183; *Kennedy v. Cotton*, 28 Id. 63; *Phenix Bank v. Downell*, 41 Id. 574; upon the question of evidence here decided, in *Gilbert v. Manchester*, 11 Wend. 629; *Statt v. Catskill B.*, 18 Id. 474; and upon usurious instruments, in *Marvine v. Hymers*, 12 N. Y. 229.

CASES
IN THE
COURT OF CHANCERY
OF
NEW YORK.

DONOVAN v. FINN.

[1 HOPKINS' CH. 59.]

A JUDGMENT IS NOT OPEN to re-examination in equity on the ground that it is wrongful or unjust, if the complainant made, or might have made, his defense at law.

EQUITY, AID IN ENFORCING JUDGMENTS.—In ordinary cases which are free from fraud or other ground specially cognizable in equity, the execution of a judgment and the methods of obtaining satisfaction are confined to courts of law.

PROPERTY NOT SUBJECT TO EXECUTION AT LAW, such as choses in action, can not be reached in equity, unless the case is otherwise of equitable jurisdiction, as where the property was fraudulently converted into choses in action to defraud creditors.

BILL in equity to seek to subject to the satisfaction of a judgment recovered by Donovan against Finn, a legacy bequeathed to Finn, and in the hands of the other defendants as executors of the will. The defendants answered that the judgment had been recovered wrongfully; and, further, the executors stated that they did not know whether Finn was absolutely entitled to the legacy, or there were debts of the estate remaining unpaid. The bill also alleged that a *fi. fa.* had been issued and was unsatisfied, and complainant took the position that having exhausted his legal remedy on the judgment by the return of the execution thereon *nulla bona*, he was entitled to the aid of this court to enable him to get at the property of the defendant, which was beyond the reach of an execution at law.

Griffin and Coudrey, for the complainant. Equity will universally aid a judgment and execution at law, and will reach choses in action, trusts and money in the public stock: *Hadden*

v. *Spader*, 20 Johns. 554; *Taylor v. Jones*, 2 Atk. 600; *King v. Dupin*, Id. 603; *Luckner v. Freeman*, Prec. Ch. 105; *Bayard v. Hoffman*, 4 Johns. Ch. 450. The reception of the property of another creates a trust.

Selden, contra. An ordinary debtor can never be considered a trustee for his creditor, and as holding his property. Moreover, no person can bring a trustee before the court for the purpose of procuring the property held in trust, but a *cestuique trust*; all others are mere strangers. Counsel examined at large and criticised the cases relied upon by the complainants.

SANDFORD, Chancellor. The objection of the defendants that the judgment of the supreme court was wrongful or unjust cannot be allowed, since that objection arises entirely from matters which were used, or might have been offered as defense at law. The judgment obtained by the complainant against James Finn is therefore not open to examination, and it must be here regarded as just. The complainant, having obtained this judgment against James Finn, issued an execution against his property; upon which the sheriff returned that he found no property from which he could levy the debt. A legacy of an amount much larger than this judgment has been bequeathed to the defendant, James Finn, by Robert Finn, deceased; the three other defendants in this suit are executors of the will of Robert Finn; they have in their hands, as executors, funds amply sufficient to discharge the legacy to James Finn; and the object of this suit is to obtain satisfaction of the judgment against James Finn, by compelling the executors of the will of Robert Finn to pay to the complainant so much of the legacy bequeathed to James Finn as will be sufficient to discharge the judgment.

The case of a legacy presents some peculiar considerations; but the opinion which I have formed in this cause will render it unnecessary to discuss them, or to consider this legacy as different from any other debt to James Finn. If an ordinary and acknowledged debt to a defendant, against whom judgment has been obtained by his creditor, cannot be converted to the satisfaction of the judgment by this court, it is clear that a legacy, of which the payment may depend upon many conditions, cannot be so applied. It is also proper to decide the more general question which the cause presents, as that question is depending in many other suits in this court, and is of more extensive application in the concerns of creditors and debtors. For the purpose of this inquiry I shall therefore con-

sider the legacy as a mere debt, absolutely due and payable to James Finn.

The cause thus considered presents these facts: A creditor has obtained judgment against his debtor in a court of law, an execution has been issued against the property of the debtor, and the sheriff has returned that none is found. The debtor has property, consisting in a debt due to him, and the creditor by judgment now asks this court to compel the debtor of his debtor to make payment to him in satisfaction of the judgment. Has this court jurisdiction in such a case, or power to give relief? To apply existing laws to new cases is the duty of courts of justice, and is not an encroachment; and the application of established principles of equity to new cases in this court, is not an extension of its jurisdiction. But this court has no power to assume any jurisdiction really new, and extending beyond the limits of its established authority. It is apparent that this case does not belong to any general head of equitable jurisdiction, such as frauds, trusts, accidents, mistakes, accounts, or the specific performance of contracts. Here is neither fraud, nor trust, nor accident, nor any other ingredient of equitable jurisdiction. It is the simple case of two debtors and two creditors, of whom one is both debtor and creditor; a case in which the rights and the remedies of the respective parties have hitherto been enforced exclusively in the courts of law.

The English cases which are recited as applicable to this question have been fully examined by the late chancellor in cases before him; and they were also reviewed by Judge Woodworth in the case of *Hadden v. Spader*, 20 Johns. 562. It is not shown by any of those cases that the English chancery ever touched an ordinary debt due to the judgment-debtor, for the purpose of applying it to the satisfaction of the judgment. The English books are, therefore, by their silence, authority to show that no such doctrine was ever entertained in the English courts of equity. The English cases cited proceeded, as I conceive, not upon the ground of subjecting the credits of the judgment-debtor to the payment of his debts, but upon some ground of equitable jurisdiction, as fraud or trust existing in each case. The case of *Taylor v. Jones*, 2 Atk. 600, was a case of fraud and trust. But I forbear to enter into a particular examination of those cases, because they by no means embrace the extent of the present question, and because so far as they extend, I concur with Judge Platt (20 Johns. 575) in thinking

that they present such a contrariety of decisions and loose expressions that we are at liberty to decide the question upon principle.

The cases adjudged by our own courts have proceeded, I conceive, not upon the doctrine that this court has power to attach a debt due to the judgment-debtor, and apply it to the satisfaction of the judgment-creditor; but upon some fact or ingredient of equitable cognizance in each case, which gave jurisdiction to this court. The case of *Bayard v. Hoffman*, 4 Johns. Ch. 450, was not the case of a judgment-creditor; but the object of the suit was to annul an assignment in trust made by a debtor without consideration. The assignor was insolvent when the assignment was made; that fact not being then known, no actual fraud was intended; but the assignment had all the operation of fraud against the creditors of the insolvent debtor. Fraud, trust, and a conveyance without consideration were the characteristics of the case; and for these reasons the cause was of equitable jurisdiction. In the case of *McDermut v. Strong*, 4 Johns. Ch. 687, an assignment by an insolvent debtor, in trust for certain objects, was declared to be incompatible with the rights of a judgment-creditor. The property assigned was a ship; an execution, at the suit of the judgment-creditor, could not be levied upon the ship by reason of the assignment, and the object of the suit was in effect to vacate the assignment as an impediment to the due effect of the execution. This court gave relief, and the effect of the decision was to remove the assignment, which stood as a special obstacle to the due course of law.

The case of *Hadden v. Spader*, 5 Johns. Ch. 280, and 20 Johns. 554, was also a case of an assignment by an insolvent debtor of property upon various trusts. It was clearly a case of trust; the assignment was charged to have been made by fraud, and though the answers denied that fraud was intended, the facts exhibited a case of fraud. The effect of the assignment, if it had prevailed, would have been to withdraw and screen from execution the property of the debtor; the assignment was held to be void, and the judgment-creditor had relief. These are the principal cases which have been adjudged in this court, and in all of them, some acknowledged ground of equitable jurisdiction existed. In general, they were suits to set aside conveyances, which prevented the seizure of property by the sheriff, and the conveyances have been considered frauds, either actual or constructive. They have been cases in which the property

assigned would have been subject to the execution of the judgment-creditor, if the assignment had not been made, and the assignment has been impeached upon some ground, which gave cognizance of the case, to this court. In giving relief in such cases, this court does not proceed upon the idea of giving execution against a species of property, which is exempt from execution at law, but it acts upon some of the most ancient grounds of its jurisdiction, which enable it to give relief in cases of fraud and trust, either to a judgment-creditor, or to any other person whose just rights may be destroyed or impeded by such a cause.

The case of *Hadden v. Spader* was finally decided by the court of errors, and the decree of this court was affirmed. I consider the decision of the court of errors in that case as establishing precisely what the late chancellor had before decided by his decree in the same cause and nothing more, and I fully concur with Judge Platt, in his opinion given in that case, and in his view of the powers and jurisdiction of this court, in respect to the rights and remedies of creditors. The case now to be decided has not one feature of equitable jurisdiction. In it there is neither fraud, nor trust, nor conveyance of property, nor any interruption of the effect of an execution, or the due course of justice at law. It is the case so common in the transactions of society, in which a person being the debtor of one man, is at the same time the creditor of another, without fraud or trust; the several parties standing merely in the general relation of debtors and creditors. In such a case, this court has no power to compel C., who is indebted to B., who is the debtor of A., to make payment to A.; and this court is equally destitute of jurisdiction to compel such a payment, whether A. has obtained judgment against B. or not.

According to our distribution of jurisdictions, suits for the recovery of ordinary debts are appropriated to the courts of common law; and the proceedings for enforcing the judgments rendered in such suits are alike allotted to those courts. In any such case where the subject of the suit is exclusively of legal cognizance, a court of equity has no jurisdiction to enforce the judgment by its own methods of proceeding, or to give a better remedy than the law gives. If the remedies of the law are imperfect, equity, as has been often said in the English chancery, has no jurisdiction to give execution in aid of the infirmity of the law. When any fact giving equitable jurisdiction intervenes in the transactions between creditor and debtor, such a fact becomes a foundation of relief in this court;

but in any ordinary case, free from fraud or injustice, the execution of the judgment and the methods of compelling satisfaction, are confined to the courts of law. When a creditor comes to this court for relief, he must come, not merely to obtain judgment or satisfaction of a judgment, but he must present facts which form a case of equitable jurisdiction. He must show that the debtor has made some fraudulent disposition of his property, or that the case stands infected with some trust, collusion or injustice, against which it is the province of this court to give relief. In such cases this court has jurisdiction, not for the purpose of giving a species of execution which the courts of law do not afford, but for the purpose of giving relief in the particular cases allotted to its jurisdiction; and when the cause, by reason of such facts, is properly here, the court proceeds, upon all the circumstances of the case, to give final and equitable relief.

When, upon an execution, the sheriff returns that no property of the debtor is found in his county, the return is evidence of the fact stated; but neither the return nor the fact returned gives any jurisdiction to this court. If the same fact were returned from every county of the state, these remedies at law would be exhausted; but equity would have no jurisdiction upon the mere ground that no property had been found by the sheriffs. But when equity has jurisdiction, by reason of some disposition of the debtor's property, made in fraud of the creditor, and when in such a case, the sheriff of the county in which the property is situated returns upon the execution that no property is found, the return is important evidence to show that the fraudulent disposition has had effect by preventing the service of the execution. By the existing law, the property of a debtor consisting of things in action held by him, without fraud is not subject to the effect of any execution issued against his property; and while a court of law does not reach these things by its execution, a court of equity does not reach them by its execution, for the purpose of satisfying either judgments at law or decrees in equity. To subject these things to the satisfaction of a judgment, by seizing and selling them like goods in possession, would be to alter the established law of the land; and this court has no power to make such an alteration in the name of equity. The maxims that every right has a remedy, and that where the law does not give redress, equity will afford relief, however just in theory, are subordinate & positive institutions, and cannot be applied, either to subvert

established rules, or to give the court a jurisdiction hitherto unknown.

When it is said that a debtor may now convert all his effects into stocks, credits, or other things in actions, and may in his own name, or in the name of a friend, hold his property in these forms, in defiance of his creditors, our laws are reproached by a vague assertion, which is partly true, and is to a much greater extent erroneous. All conveyances made to defraud creditors are void both in law and equity. When the fraud appears to a court of law, the conveyance is there adjudged void. When such a fraud is presented to this court, it is of equitable jurisdiction; and the property of the debtor, fraudulently transferred, is subject to the satisfaction of his debts, in favor of a creditor complaining of the fraud. Does an insolvent debtor transfer his property to another person, in trust, for himself, or in such a manner as to defeat the effect of a judgment and an execution? This is the frequent case; it is a case of both fraud and trust, and it is of equitable jurisdiction. It was the case of *McDermut v. Strong*, and of *Hadden v. Spader*. In all such cases this court vacates the fraud, sets aside the conveyance in trust, and, acting both upon the debtor and his trustee, it does complete justice to the creditor. Thus, the jurisdiction of this court reaches, and reaches effectually, those cases of fraudulent conveyances and assignments in trust, which form the great and most vexatious impediment in the course of justice between creditor and debtor. Bills for discovery, where no relief is sought, also afford important aid to creditors against their debtors. But this court has no power to cause stocks, credits and rights of action, held by a debtor, without fraud, to be sold or converted into money, to be transferred to the creditor, or to be applied to the payment of debts. The English courts of equity have never exercised any power like that now proposed, over the rights of a debtor; and it is certain that no such power has ever been exercised by any court in this state.

But it is said that a failure of justice must take place, if such a jurisdiction should not be exercised by some of our courts of justice. How, it is asked, is all that class of personal effects, consisting in stocks, credits and property in action, in various forms, a class of property, which, in this community, is very great, to be subjected to the payment of debts? That such property should be made subject to the payment of the debts of its owner is not denied. That such property cannot be seized or sold by the sheriff upon an execution, is the existing law

of the state. That in the present state of our laws, a debtor sometimes holds and enjoys this species of property, while his debts remain unpaid, may be true. These reasons may show that the existing laws are imperfect; and that some convenient method of subjecting this class of property to the payment of debts would be a desirable amendment; but they do not show that this court or any other tribunal has power to make such an amendment. The argument so strongly urged, that justice requires some new remedy in these cases, is an argument to be addressed to the legislature, and not to the courts of either law or equity.

Our ancient law was not destitute of remedy in such cases. That law was intended and adapted to compel the application of all the property of the debtor to the discharge of judgments against him; and for that purpose different kinds of executions were provided. By executions against his property in possession, that species of effects was subjected directly to the discharge of a judgment; but his things in action were reached only by an execution against his person, upon which he was imprisoned until he should satisfy the judgment. The execution against the person was a method of coercion intended to bring forth for the satisfaction of the judgment, all such effects of the debtor as could not be subjected to other execution; and it was a powerful remedy. That remedy has been gradually relaxed by the legislature until it has nearly lost its efficacy; and while this great change respecting executions against the person has been made, the rules concerning executions against property have remained without alteration. Thus the imprisonment of the debtor, as a remedy, has been, in effect, taken away; no effectual method of execution against his property in action has been substituted, and this change in our laws has been made by the legislature itself.

The legislature has, indeed, made some provisions for the benefit of creditors in these cases. By the acts for giving relief in cases of insolvency now in force, an assignment of all the property of a debtor imprisoned in execution, may be obtained for the benefit of his creditors in certain cases, and upon certain conditions. This remedy is tardy, incumbered with conditions and inadequate to the ends of justice. Still, it is the remedy which the legislature has given after the legislature itself had, in effect, abolished the coercion of personal imprisonment. Equity, as a system distinct from law, has been raised and matured into its present perfection, not for the purpose of

preventing or controlling the operation of statutes, but in order to supply other defects, and to afford justice where injustice was produced, by severe rules of the common law. The idea that this court has power to provide for all the mischiefs or inconveniences which result from the operation of new statutes, is repugnant both to the established limitations of its jurisdiction, and to the constitutional separation between the legislative power and the power of the courts of justice. Various laws concerning bankrupts, insolvent debtors, and absent and absconding debtors, make, or have hitherto made, ample provision that all the rights in action of the debtor, shall be vested in assignees or trustees for the benefit of all his creditors; and while such laws show what justice and public policy have been supposed to require, they also show that the general law on this subject can be altered only by the legislative power. If such laws, or any of them, are not now in force, it is because the congress of the union, or the legislature of the state, have not passed them, or have repealed or modified those which have been enacted.

It is said that the court of chancery of England has never exercised a jurisdiction like that now proposed, because redress to creditors in these cases, is afforded by the bankrupt laws of that country. This inference is altogether unsound. If the English chancery had ever possessed such a jurisdiction the fact would appear; and that jurisdiction would have been exercised in the numerous cases to which those bankrupt laws do not extend. The bankrupt laws of England were made to give redress which the courts of that country did not before afford, and if those bankrupt laws were repealed, it would not follow that the English chancery would have power to accomplish objects, which, in the opinion and practice of that country, could be effected only by an entire system of statutory regulations. If the attempt now made could prevail, it would be, in effect, nothing less than to introduce a new law of attachment, for the benefit of particular creditors, through the process of a court of equity.

Our law of relief against absconding and absent debtors, is a law of attachment. This special statute, containing a system of provisions in detail, is alone a sufficient proof that the proceeding by attachment can be authorized only by the legislature, and that such a process or power, belongs not to any court of this state, in virtue of its general jurisdiction. The attachment given by this statute embraces all debts due to the debtor, is

for the benefit of all his creditors; and is authorized only against absent, absconding, and concealed debtors. The legislature has not given this remedy against debtors residing or found within the state, and subject to the full operation of its general laws. The attachment now proposed is against a single debtor of the judgment-debtor, for the benefit of the judgment-creditor; and all the parties reside in the state. Thus it is proposed that this court shall institute a new species of attachment against debtors within the state, a new method of justice in favor of creditors, differing greatly from any attachment or any execution hitherto known, and which, however it may be recommended, has not yet been adopted by our law.

In several of the states of the Union there are laws of attachment, by which a creditor may sequester or attach, for his exclusive benefit, a debt due to his debtor; and it is said that these laws are useful and efficacious, in promoting the ends of justice. But in all those states, these attachments have been introduced and established by special acts of their legislatures; this proceeding being unknown equally to the common law and to the equity of England. But while the attachment of the debt due to a debtor for the benefit of the creditor instituting the suit, is a proceeding unknown to the general system of English law and equity, it is fully established in the city of London, under the name of the custom of foreign attachment, and it there takes place in a local court of special jurisdiction. Thus stand both the general law, and the exceptions to it, in England; and equity has never altered but has always followed the general law. The court is now, for the first time, asked to do what, in England, is done, only in London, by a special custom of that city, what in other states of this Union is done only under the provisions of special statutes, and what, in this state, has never yet been done or authorized by any law.

If this court were at liberty to enlarge its powers in the manner now proposed, the extent and consequences of so great an innovation would deserve to be well considered. Is the right to this attachment to be given to the creditor who institutes a suit, or to him who has obtained judgment, or to him only who has issued an execution which proves ineffectual? When the debtor is insolvent, justice requires all his property should be distributed ratably among all his creditors? It is proposed that this court shall perform all the various offices of a law of bankruptcy; shall take upon itself the administration of the estates of bankrupts, shall collect all the effects of a debtor which cannot be

seized by the sheriff, and make distribution among creditors who shall prove their debts. To what species of debts or property in action shall this attachment be applicable? Is it to extend to all contracts, demands and rights of action admitted or contested which the debtor may hold against other persons? Where the property of a debtor consists in effects which cannot now be sold by the sheriff, is the creditor who has obtained judgment to find that a suit in equity is necessary in order to obtain the effect of a suit at law? Is a suit at law to be the parent of a suit in equity in the multitude of these cases which always exist? When A. institutes a suit at law against B., the cause is determined according to the course of the common law; but when A. has obtained judgment against B., who has a claim against C., which also belongs to legal jurisdiction, is C. to be impleaded in equity by A., and to defend himself there against A., when if C. had been impleaded by his own creditor, B., the suit must have been in a court of law? Is a judgment at law against the first debtor indispensable because the case is of legal cognizance; and is it insisted that the case of the second debtor of the same nature is not legal, but is of equitable jurisdiction?

Under the constitution, the course of common law, the trial by jury, and the system of equity, must all be maintained in their respective spheres of operation. If the existing difficulty in these cases arises from the rule of law, that stocks, credit and rights of action cannot be sold by the sheriff, is that rule salutary, since the remedy by imprisonment of the debtor has been so greatly relaxed? If some new proceeding by way of attachment or execution against the rights in action of a debtor is requisite, on what courts or officers shall such a power be conferred, and in what cases, and under what regulations shall it be exercised? But I forbear to pursue these inquiries and reflections; and these are suggested merely to show the magnitude of the innovation now proposed. Should this court take cognizance of these cases, they would form a chapter of jurisdiction far more ample than any one which it now possesses, and the assumption would be a bolder stride of power than was ever made by the English chancery in any single age. The maxim which teaches us that a judge should amplify his own jurisdiction, has no place in our own institutions. The utility of this court, so important in the general structure of our system, will be best consulted and preserved by preserving its jurisdiction within the limits which are now established.

My views of this question terminate in the following results:

1. The cases of authority in which relief has been given to judgment-creditors were, in themselves, cases of equitable jurisdiction, involving fraud or trust, or seeking to subject to the satisfaction of a judgment property in itself liable to execution by removing a conveyance which operated as a fraudulent impediment to the execution.

2. This court has no power to compel the debtor of a judgment-debtor to make payment to the judgment-creditor, in satisfaction of the judgment.

The suit is dismissed with costs.

CHOSES IN ACTION SUBJECT TO CREDITOR'S BILL.—It is doubtful, where there has been no legislation upon the subject, whether in the absence of fraud, or any other well-known ground for supporting the exercise of its jurisdiction, equity will assist a creditor to reach those assets of his debtor which under no circumstances could have been subject to execution at law. This question has been most debated with reference to stocks and choses in action. Notwithstanding a contrary opinion expressed by some very eminent American jurists, we judge that the weight of the authorities is in support of the view that equity has no power in ordinary cases to compel the appropriation of choses in action to the payment of their owner's debts: *Watkins v. Dorsett*, 1 Bland. Ch. 533; *Stewart v. English*, 6 Ind. 176; *Wallace v. Lawyer*, 46 Id. 501; *McFerran v. Jones*, 2 Litt. 219; *Dundas v. Dutens*, 1 Ves. jun. 196; *Nantes v. Carrock*, 9 Ves. 188; *Rider v. Kidder*, 10 Id. 368; *Grogan v. Cooke*, 2 Ball & B. 233. But where a sequestration of the property of a defendant is being made, a person who admits owing him a certain sum may be compelled to make payment thereof to the sequestrators: *Francklyn v. Colhoun*, 3 Swanst. 276; *Pelham v. Newcastle*, Id. 290; *Keighler v. Nicholson*, 4 Md. Ch. 87; *Keighler v. Ward*, 8 Md. 254; *Johnson v. Chipdall*, 2 Sim. 55; *White v. Geraedt*, 1 Edw. Ch. 340. It has also been insisted that where there is no other method of obtaining satisfaction, equity ought to, and will, interpose for the purpose of compelling satisfaction to be made out of the defendant's choses in action: *Pendleton v. Perkins*, 49 Mo. 565; *Powell v. Howell*, 63 N. C. 283; *Edmeston v. Lyde*, 1 Paige, 637; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Stinson v. Williams*, 37 Ga. 170; *Rogers v. Jones*, 1 Neb. 417. In many of the states statutes have been enacted in harmony with this view: *Davis v. Sharron*, 15 B. Mon. 64; *Burnes v. Cade*, 10 Bush, 251; *Wright v. Petrie*, 6 S. & M. 282; *Fuller v. Taylor*, 2 Halst. Ch. 301; *Fantum v. Green*, 21 N. J. Eq. 364; *Long v. Page*, 10 Humph. 541; *Hitt v. Ormsbee*, 14 Ill. 233; *Bryans v. Taylor*, Wright, 245; *City of Newark v. Funk*, 15 Ohio St. 462. What stocks, choses in action, franchises, and other property which was not subject to execution at common law, can now, in the absence of any statute on the subject, be reached by a creditor's bill must still be regarded as unsettled. By such bills, creditors have in several instances succeeded in obtaining satisfaction out of the interest of an heir or distributee while still in the hands of an executor or administrator: *Moore v. White*, 3 Gratt. 139; *Ryan v. Jones*, 15 Ill. 1; *Sayre v. Flournoy*, 3 Kelly, 541; *Farrar v. Haselden*, 9 Rich. Eq. 331; *Caldwell v. Montgomery*, 8 Ga. 106; *Long v. Brown*, 21 Mich. 179; out of a right of dower before the assignment and segregation thereof: *Stewart v. Martin*, 5 Barb. 438; *Tomkins v. Fonda*, 4 Pai. 448; out of moneys collected under execution and still in

the hands of the sheriff: *Brenan v. Burke*, 6 Rich. Eq. 200; out of moneys earned but not due: *Thompson v. Nixon*, 3 Edw. Ch. 457; *Browning v. Bettie*, 8 Pa. 448; and out of moneys collected under an invalid assignment: *Blood v. Marcuse*, 38 Cal. 590. It has also been determined that the creditor of a corporation can sustain a creditor's bill to compel the stockholders to pay to him delinquent subscriptions upon its stock: *Henry v. V. & A. R. R. Co.*, 17 Ohio, 187; *Miers v. Z. & M. T. Co.*, 11 Id. 273, and 13 Id. 197.

WARD v. ARREDONDO.

[1 HOPKINS' CH. 212.]

JURISDICTION, SPECIFIC PERFORMANCE.—A contract was made in Cuba by a citizen of New York with a Spanish subject, for the purchase of lands in Alabama. After partial payments had been made, and partial conveyances executed, the vendor sent a conveyance for part of the lands to his agent in New York, to be delivered on payment of a certain sum claimed, which was more than the vendee conceded to be due: *Held*, that the courts of New York had jurisdiction of a bill filed by the vendee for an account of payments and lands to be conveyed, and to restrain defendants from withdrawing the deed out of the jurisdiction of the court.

JURISDICTION IN EQUITY MAY BE UPHOLD whenever the parties, or the subject, or such a portion of the subject, are within the jurisdiction, that an effectual decree can be made and enforced, so as to do justice between the parties.

APPEAL from a decree of the circuit court dissolving an injunction. The complainant had filed his bill against the defendants, partners and residents of Cuba, and one Thomas, their agent, to obtain a conveyance of realty, and an accounting of moneys paid to the partners under a contract for the sale of certain lands in eastern Florida, which contract was made by the complainant with the defendants when he was in Cuba. It appeared that the Arredondos were to execute deeds to Ward for specified tracts, corresponding to the amount of the installments paid, and that they had forwarded to Thomas, their agent, a deed for the residue of the land contracted to be sold to plaintiff; but had commanded Thomas not to deliver the deed to the plaintiff until the payment of a sum of money, much larger than the latter acknowledged to be due. The bill prayed an injunction to restrain the defendant, Thomas, from sending back the deed to Cuba. Defendant, Thomas, answered; and the remaining defendants not appearing voluntarily, an order was made directing them to appear, and answer within nine months on pain of having the bill taken *pro confesso*. On the same day, defendants' counsel gave notice of motion to dis-

solve the injunction. Upon the hearing of this motion, the injunction was dissolved, the court being of opinion that he had no jurisdiction in the case, as the land in controversy lay in east Florida, the Arredondos resided out of the state, and had not been within it since the filing of the bill, and as Thomas had no interest in the same, and making him a party could not sustain the jurisdiction of the court. The complainant appealed.

Colden and C. Graham, for the appellants, urged that the case was a proper one for relief in equity, it being for the specific performance of a contract, for an account; and on the ground of fraud. They contended that the fact of the title to land being involved in the cause ought not to arrest the court's jurisdiction: *Arglasse v. Muschamp*, 1 Vern. 75; *Foster v. Vassall*, 8 Atk. 587; *Roberdeau v. Rouse*, 1 Id. 543; *Penn v. Lord Baltimore*, 1 Ves. 444; *Cranstoun v. Johnston*, 3 Ves. jun. 182; *Hays v. Ward*, 4 Johns. Ch. 134 [8 Am. Dec. 554]; *Livingston v. Ogden*, Id. 48; *Dale v. Roosevelt*, 5 Id. 174.

H. and R. Sedgwick, contra. The court has no jurisdiction, to give which there must be one of three things: 1. The person must be within the reach of the court; 2. The subject to which the contract or fraud relates must be here; 3. Or the cause must be in the forum of a government which has some superior jurisdiction over that of the country in which the subject is situated, as in the case of the isle of Sark, or of Ireland. Although the deed is here, it is but an escrow, and if delivered by compulsion of the court, will not be the deed of the Arredondos.

By Court. This is in effect a bill to enforce a specific performance of the contract, by laying hold of the deed which is within the jurisdiction of the court. If the land and all parties were within the jurisdiction, it would be the ordinary case. The peculiarity is that the land and the only party defendant, who has an interest, is out of the jurisdiction, and on this the objection rests.

I was at first inclined to think that this was carrying the jurisdiction of the court farther than has ever been done; but the peculiarities of the case are such as make a difference in circumstances, not in principle. An objection has been made that there may be different suits under different jurisdictions, and thence that there may be conflicting decisions. It is very true that none but the courts of Alabama can determine the title to the land in the last resort; but this objection proves too much.

It would prove that no suit can be entertained on this contract, except in Alabama. The elementary principle seems to be that the jurisdiction may be upheld, wherever the parties or the subject are within the jurisdiction, that an effectual decree can be made and enforced, so as to do justice between the parties. Suppose, then, the parties to the suit were reversed, and that Arredondos sought here to enforce payment from Ward, they might do so; Ward is here and is subject to a decree, and perfect justice might be done.

The dispute, then, is about a personal contract which is transitory, and may be enforced in any country. To enforce it here, encroaches not upon any jurisdiction of Spain or Alabama. The deed is here subject to our jurisdiction; that deed is such a portion of the subject in question, that by acting upon it, the court may decide the controversy, and do complete justice between the parties; and to do so is going no further than has been done by the English court of chancery, and in the case in this country, cited from Cranch. The case comes up on an appeal from a circuit court, and on an interlocutory order. By the statute, the cause must be remanded with the order of this court. The order, therefore, will be that the circuit court retain the injunction until the hearing, or until the equity of the bill shall be sufficiently denied by the defendants who are interested.

This opinion is to be considered as provisional, and as applicable to the state of the question as now presented, on a motion to dissolve the injunction, in which some weight may be allowed to the circumstance, that a dissolution of the injunction would, in effect, be final. This decision will not, therefore, preclude the party upon the final merits.

FAURE v. WINANS.

[1 HOPKINS' CH. 283.]

INSURANCE AGAINST FIRE is not a charge on the mortgaged premises, unless made so by agreement.

TAXES PAID ON THE MORTGAGED PREMISES are a legal charge against the mortgaged estate, even in the absence of an agreement.

BILL for the sale of mortgaged premises for the payment of a sum of money, which included the amount paid for insurance on the premises.

The COURT inquired on what ground the insurance was
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included, observing that it could not be done, unless a provision for it was included in the mortgage, or by express consent.

S. Riker said that the insurance was necessary to preserve the security, and that it was so charged in the bill, which had been taken as confessed.

THE COURT did not think this sufficient. Insurance stands on a different footing from taxes, as it may be effected by the mortgagee for his own security. But taxes are a legal charge upon the estate, not upon the mortgagee. But at a subsequent day an order was taken on Mr. Riker's motion that the master should report whether any agreement existed between the mortgagor and mortgagee, by which the former agreed that the premises should be insured and the policy assigned to the mortgagee; and whether there was any agreement to renew the policy at the expense of the mortgagor and his assigns, and whether it has been renewed; and whether the moneys reported by the master as paid for insurance were paid by the request, consent, or approbation of the defendant Winans, after he became proprietor of the premises.

The master's report upon this reference was satisfactory, upon which the decree passed, including the charge of insurance.

OVERBACH v. HEERMANCE.

[1 HOPKINS' CH. 337.]

INFANTS COMPELLED TO ELECT.—If an agreement be made by adults on one side and infants on the other, the latter, on coming of age, will be compelled to make an election either to confirm the agreement as a whole, or to relinquish all rights and pretensions resulting from it.

BILL seeking general relief, and setting forth as ground therefor, that the complainants and those under whom they claimed entered into an agreement with the guardian of the defendants, with the consent of those infants who had then arrived at years of discretion, for the partition of a certain tract of land, and for the execution of mutual releases extinguishing their rights of common; that the defendants by reason of their infancy at the time of the agreement, did not execute releases, but their guardian promised that they should do so on arriving at age; that complainants have released their right to the tract held by the defendants; that the defendants have arrived at age, but deny the agreement, refuse to execute a release, and have com-

menced an action of trespass against the complainants for cutting wood on the half partitioned to complainants. The bill also prayed an injunction against the action at law.

Van Buren, for the complainants.

J. V. D. S. Scott, *contra*.

SANDFORD, Chancellor. The minors were not bound by the agreement and partition; and they were at liberty when they reached legal age, as they now are to adopt or reject those acts. But if they adopt those acts in part, they ought to adopt them in whole, or in such a manner as to do no injustice to others. It is only upon this principle of equity that the complainants can have any relief; and to such relief they are, I think, entitled in this case. The decree will be that the defendants make an election either to confirm the agreement, or to relinquish all rights and pretensions resulting from it. I perceive no sufficient reason that either party should recover costs against the other.

SNOWDEN v. NOAH.

[1 HOPKINS' OIL 347.]

A NEWSPAPER ESTABLISHMENT is the subject of property, and, so far as the rights of such an establishment are private and exclusive, this species of property will be protected by law.

GOOD-WILL OF A NEWSPAPER may be protected from deception and piracy, but not from the competition of a rival, though he uses a name somewhat similar to that of the journal first established.

INJUNCTIONS issue to protect those rights only which are clear, or at least free from reasonable doubt.

BILL for an injunction to restrain Noah from interfering with complainant's business in the publication of the newspaper called the National Advocate, which Snowden had purchased at a trustee's sale. Noah had been employed by the trustees to edit the paper prior to the sale. The facts are further stated in the opinion.

D. B. Ogden, for the complainant.

Spencer, *contra*.

SANDFORD, Chancellor. The defendant Noah was the editor but not the proprietor of the newspaper establishment called the National Advocate, and immediately after the sale of that establishment by its former proprietor to the complainant, Noah

established another newspaper, under the title of the New York National Advocate. This new gazette, thus established, is sent to the subscribers of the former National Advocate, and Noah has solicited and continues to solicit the support of the patrons of the former paper, and of the public to his newspaper. This is briefly and in substance the case upon which an injunction is now asked.

The business of printing and publishing newspapers being equally free to all, the loss to one newspaper establishment which may follow from the competition of any rival establishment is merely a consequence of the freedom of this occupation, and gives no claim to legal redress. But a newspaper establishment is also a subject of property; and so far as the rights of such an establishment are private and exclusive, this species of property, like any other, is entitled to the protection of the laws. The material property of the National Advocate is not here in question. The printing office, press, types, and other material of a printing establishment, are subjects of exclusive right, and the injuries alleged in the bill in respect to these subjects in this case are matters for which redress must be sought in courts of law. The subject in respect to which an injunction is asked, is what is called the good-will of the establishment, or the custom and support which the National Advocate had before received from its subscribers and patrons, or from the public. The effort of Noah is to obtain for his newspaper the support of the public in general, and especially the custom and good-will of the friends of the National Advocate; this object is distinctly avowed, and an open appeal is made to the friends of the National Advocate and to the public, to give their support to the newspaper. The question is, whether the acts of Noah are an invasion of the private rights of Snowden as the proprietor of the National Advocate, or merely an exercise of the common right to print and publish a news journal, and to obtain for it patronage.

The open appeal made to the public in favor of the new journal, as a new and distinct paper, seems to remove from this case every objection. Noah is at liberty to invite the subscribers and patrons of the National Advocate to give him their support, and they are entirely free to accept or reject his invitation. They, like others, may give their support to either, or neither, or both of these papers. The only circumstance in this case which has any appearance of undue encroachment upon the rights of Snowden is that Noah's newspaper is published under

a name nearly the same with that of Snowden. But the name of the new paper is sufficiently distinct from the name of Snowden's paper to apprise all persons that these are really different papers. These different titles and the different matters which must appear in two daily gazettes, seem to afford all the information which can be desired by those who claim to give their patronage to either of these papers. I do not perceive that any person can be misled in this respect, and the whole case seems to be nothing more than an open competition between two newspaper establishments, for the good-will of those who were the patrons of the first establishment, and for the favor of the public.

The good-will of an established trade, the custom of an inn, and the right of a publisher of books, may be injured by acts of deception or piracy; but the injury for which redress is given in such cases results from the imposture practiced upon the customers of an existing establishment, or upon the public. When the friends of an existing newspaper, and the public, are informed by a rival newspaper that the two papers are not the same, but are distinct establishments, there is no deception; and the detriment which either establishment may suffer from the free option of those who choose to give their support to one establishment in preference to the other. This employment is subject to all the incidents of a free competition, and when no deception is practiced, the award of the public, or of those who patronize newspapers, must determine the patronage which each rival press shall receive. The adjudged cases cited in support of this application are: *Hogg v. Kirby*, 8 Ves. jun. 215, and *Crutwell v. Lye*, 17 Id. 336. The cases seem to be rather authorities against the application. In the last of them, the substance of Lord Eldon's opinion was expressed in the following sentence, which is directly applicable to this case: "It amounts to no more than that he asserts a right to set up the trade, and has set it up, as the like but not the same trade with that sold; taking only those means which he had a right to take to improve it; and there is no fact, amounting to fraud, upon the contract made with the plaintiff."

It appears to me that every person who is disposed to patronize or support the National Advocate may do so, without being deceived or misled by the existence or publication of the New York National Advocate. The struggle of these parties seems to be merely a competition, in which there is no imposture or deception. I do not perceive any fraud; but if there

is any question whether the acts of Noah are a fair competition or a fraudulent interference with the establishment of Suowden, it is a question wholly uncertain; and as a doubtful matter of fact it should be left to the trial by jury in the ordinary course of law. The writ of injunction is a most important remedy; but it is used to protect rights which are clear, or at least free from reasonable doubt. Upon all the facts of the case, the motion for an injunction is denied.

MORAN v. DAWES.

[1 HOPKINS' CH. 365.]

ALIENATION OF PROPERTY by a defendant will not be enjoined at the instance of a creditor who has obtained a verdict but has not recovered judgment, although the defendant is seeking to elude the judgment.

BILL for an injunction to restrain defendant from selling his property pursuant to public notice, alleging that such sale would defeat a verdict recovered by the complainant in an action of seduction against the defendant, wherein a motion for a new trial had been made. The notice of sale had been advertised after recovery of the verdict, but before judgment was perfected. The injunction was granted.

Spencer, moved to dissolve the injunction.

Golden, *contra*.

SANDFORD, Chancellor. In the case of *Wiggins v. Armstrong*, 2 Johns. Ch. 144, the late chancellor held that a creditor before judgment is not entitled to this interposition against his debtor. The English cases applicable to this question were reviewed by the late chancellor in that case, and they fully establish the conclusion which he deduced from them. The question is therefore entirely settled by authority. Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment, and upon the personal goods of the debtor by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are required the debtor has full dominion over his property; he may convert one species of property into an-

other; and he may alienate to a purchaser. The rights of the debtor and those of the creditor are thus defined by positive rules; and the points at which the power of the debtor ceases, and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any interposition of equity. If courts of equity could by injunction compel a debtor to hold his property until a judgment should be obtained against him, they would indirectly, but in effect, alter these regulations of positive law.

The case now before the court does not rest upon the doctrines concerning fraudulent conveyances. The defendant is about to sell his lands by public auction in order, as the bill alleges, to elude the judgment which the complainant may recover. The meditated fraud consists in an intention not to pay the judgment which may be recovered; and the conversion of the defendant's lands into money may prevent or impede the effect of an execution against his property. But such an intention does not deprive a debtor of his power of alienating to any person who may purchase in good faith. If a judgment should be recovered and an execution against his property should prove ineffectual, his person will remain liable. Here is no collusion or fraudulent concert with any person as a purchaser or trustee. The sales which the defendant is about to make may be wholly free from any fraud between him and the purchasers. No decree for relief can be made upon the bill. The sole object of this bill is the injunction, and the sole object of the injunction is to compel the defendant to hold his lands until a judgment may be recovered against him.

It is not necessary here to inquire how far the remedies given by our laws to creditors against debtors are adequate to the ends of justice. Some of my views of that subject were given in the case of *Donovan v. Finn*, 1 Hopk. Ch. 59. It suffices for the determination of this question that by our law the complainant has no lien or right in the lands of the defendant; that the defendant may, notwithstanding the pendency of the suit against him, sell his lands; and that equity does not vary these legal rights. The rights of these parties in this respect are not varied by the nature of the cause of action, or by the verdict. A creditor whose debt may be acknowledged or free from doubt acquires no lien, otherwise than by a judgment, and a cause of action arising from tort gives no lien in any other manner. Nor does a verdict create any lien. Neither the existence of a just demand, nor the moral obligation of a debtor,

nor the commencement and progress of a suit, can give that right which our laws assign only to a final judgment.

In every view it is clear that this injunction must be dissolved.

SEYMOUR v. DE LANCEY.

[1 HOPKINS' CH. 436.]

SPECIFIC PERFORMANCE, DOUBTFUL TITLE.—If it is claimed and appears probable that a deed through which complainant's title is deraigned is a forgery, and it is doubtful whether he has been in possession sufficiently long to obtain title through the operation of the statute of limitations, the case is a proper one for an issue at law to determine whether the title is good.

SPECIFIC PERFORMANCE, TITLE BY PRESCRIPTION.—If the vendor has been in adverse possession for the time specified in the statute of limitations, his title is not so impeached as to prevent his maintaining a suit for specific performance, by slight proof that the former owner was an alien, nor by the mere contingency that such owner may have died leaving heirs disabled from asserting their rights.

BILL for a specific performance. The case came before this court on exceptions to the decrees of the master. The opinion states the case.

Hopkins and Dyckman, for the defendants.

Henry, *contra*.

SANDFORD, Chancellor. The master has reported that, in his opinion, the complainant can give a good title to the lands which were agreed to be conveyed to Thomas Ellison, deceased, and ten exceptions to the report are taken by the defendants. The exceptions object to opinions of the master upon particular questions which arose before him, and also to his conclusion that the complainant's title is valid. The inquiry referred to the master was, whether the complainant's title is good or not, and it will be sufficient here to consider that question as embracing all the exceptions. The title to the lands now in question was in Benjamin Smith, in 1782, and he then conveyed to Henry E. Lutterloh. A deed from Henry E. Lutterloh to Henry L. Lutterloh, bearing date the sixteenth day of March, 1786, is produced, and one question is, whether this deed is genuine or not. This deed has not been acknowledged or proved, and it is not now proved to have been executed to Henry E. Lutterloh. It is in evidence only, upon the doctrine that an ancient deed may be received without proof of its execution,

when it is free from suspicion upon its face, and is offered to support a title concurrent with possession. This deed is impeached by four witnesses, John Anderson, Comfort Sands, David Wolfe and James Abeel. They state that they knew the writing of Henry E. Lutterloh, and that, in their belief, the name subscribed to this deed is not his handwriting. This testimony of four witnesses concurring in the same opinion must destroy this deed, or at least, render its genuineness extremely doubtful.

William Seymour, deceased, was in possession of this land during a long period, but the commencement and duration of his possession do not appear with any exactness. Isaac Belknap, a witness, says, that he thinks that Seymour was in possession upwards of thirty years, and that Seymour, before his purchase from Hallett, held possession under Hallett. The land had been, for a considerable time, uninclosed, and Seymour's first occupation was by laying timber on it. The deed from Hallett and his wife to Seymour, bears date the thirty-first day of October, 1800, and Seymour's possession prior to that time seems to have been a very slight and imperfect occupation. The possession of Seymour must, I think, be regarded as adverse and exclusive, only from the time of his purchase from Hallett, and if so, it was not of sufficient length to give that title, which results from an adverse possession and the limitations of action. Henry E. Lutterloh died in 1786. It was suggested that he was an alien, and this suggestion is founded upon the testimony of Abeel, who says that he thinks that Henry E. Lutterloh was a Prussian. If he was an alien, the land escheated to the state; if he was a citizen, it does not appear who were his heirs or devisees; but if the possession of William Seymour had been clearly adverse for twenty-five years, his title would not, I think, be sufficiently impeached, either by the slight proof that Henry E. Lutterloh may have been an alien, or if he was a citizen, by the mere contingency that his title may have resided since his death, in persons disabled to assert their rights.

There is no proof that Hallett ever had possession of this land, unless the occupation of Seymour for some time prior to 1800, is considered as the possession of Hallett. Seymour's occupation prior to 1800 might have been an adverse possession, if the title of Henry E. Lutterloh had been really conveyed to Hallett. But the only evidence that Henry E. Lutterloh ever conveyed his title, is the deed of the sixteenth day of March, 1786; and, according to the testimony, he never executed this

deed. In all the circumstances of the case, it is uncertain whether the title of William Seymour is valid by the mere force of possession. If it is not good by adverse possession, it is still more doubtful whether it is valid by a regular derivation of right from Henry E. Lutterloh. I am accordingly of opinion that the title of complainant, as far as it has been exhibited before the master, is so far uncertain that it must receive a farther investigation; and as this uncertainty arises from questions of fact, it is most proper that they should be tried by a jury. If William Seymour acquired a title by adverse possession, such a title would preclude all other inquiries; and the inquiry whether his possession was adverse or not, and the length of such a possession, are questions of fact. The inquiry whether the deed from Henry E. Lutterloh is genuine or not, is purely a question of fact. These questions are peculiarly proper for the trial by jury, as the best method of ascertaining their truth.

Equity does not compel a conveyance of a doubtful title; and the defendants contend that if this title is doubtful, the suit should be dismissed. This title is so uncertain as to require further elucidation; but it would be premature and unfit now to pronounce this title either bad or so doubtful that the contract cannot be executed. The master considers this title good; and I consider it not yet sufficiently ascertained. The uncertainty arises chiefly from vague and obscure testimony; and this uncertainty may be removed by further testimony and another investigation of facts. The examination of this title must, therefore, be pursued. When a trial shall have taken place, and a verdict shall have been given upon all the testimony which the parties may be able to produce, the court must determine this question of title, which, in my opinion, cannot now be decided, with just satisfaction, in favor of either party. An issue is accordingly directed.

FERLAT v. GOJON.

[1 HOPKINS' CH. 478.]

A MARRIAGE PROCURED BY FRAUD, error and abduction, will be vacated in equity at the suit of the innocent party.

BILL praying that a pretended marriage of the complainant with the defendant, into which complainant had been entrapped by the fraud and artifice of the defendant, be annulled. It appeared that the complainant had entered a carriage with the defendant thinking that he was about to take her to her home;

that he took her to the house of a former music-master, where a minister in robes was in waiting; that complainant, being in a state of bewilderment, was persuaded to go through with the ceremony of marriage to escape violence; that she never considered herself the wife of Gojon, and never lived with him. It appeared that a Mrs. Matthieu, who aided Gojon in the affair, had been three times convicted of burglary; it also appeared that Gojon's mind was disordered. The minister supposed that all was proper in the marriage.

Sampson argued the cause for the complainant *ex parte*.

SANDFORD, Chancellor. This is a case of a marriage procured by fraud. Miss Ferlat was entrapped into a marriage with Gojon by artifices which he employed; and though she gave an apparent consent at the moment of the celebration, yet it fully appears this consent was feigned, and that it was the effect, not of her choice, but of her terror. The clergyman who celebrated the nuptial right, supposed that he was marrying persons who were free, and had freely contracted, and he was deceived. The complainant never consented freely to become the wife of the defendant; she has never cohabited with him, and this marriage was a foul fraud, practiced upon her by the defendant. Marriage is considered by our law as a civil contract; and in this agreement, as in all others, the free consent of the parties is essential to the validity of the contract. Here was no free consent, no voluntary contract; and this fraudulent marriage must be null. Still a marriage in fact or in form has taken place between these parties, in the manner most usual in this state.

Upon the facts of this case, there can be no doubt that this marriage would be treated as null by every court of this state, in which its validity might be incidentally drawn in question. The courts of law may try and decide this question in any of the actions or proceedings which belong to their jurisdiction; such as prosecutions for bigamy, actions of trover, suits in which marital rights are claimed, or any other proceeding involving the legality of the marriage. But a court of law in any of those proceedings pronounces the marriage valid or void, only for the purpose of deciding the particular suit in which the question arises; and the decision is conclusive for no other purpose. The question is left undecided in every other respect; the same question may be again and again litigated in other suits and in other courts; and it may receive different decisions from different tribunals. This limited power of the courts of law is inade-

quate to the ends of justice and the interests of society. Marriage is one of the chief foundations of social order; it involves moral duties and legal obligations of the most serious concern, and the ties and relations which result from it are of the highest importance to the parties and to society. Morality and policy require that it should not be left unknown or uncertain, either to the parties or to others, whether the relation of husband and wife exists or not. A power should exist in some judicature to determine these questions; and such a power should be competent to determine them for every purpose, to establish the union, where the marriage has been lawful, and where the parties have been illegally married to sever them, and to vacate all pretensions to the relation of husband and wife: Paley's *Moral and Political Philosophy*, book 3, part 3; 1 Woodeson's *Lectures*, 423.

The jurisdiction of this court is that of the English chancery, with the various additions which have been made to it by our own laws. This court has jurisdiction in case of fraud, and especially in all cases of contracts procured by fraud. In such cases this court effectually annuls the fraudulent contract, adjudges it void, causes it to be delivered up or canceled, or prohibits the parties from claiming any right under it. Such is the undoubted jurisdiction of this court in other cases of contracts; and if this court has not the same jurisdiction where the contract of marriage has been procured by fraud, it is the only case of a fraudulent contract to which its jurisdiction does not extend. In England, the ecclesiastical courts would have cognizance of such a question, and would annul the marriage; but it seems that even in England the court of chancery would also have jurisdiction of such a case as a fraud. If no instance of this kind is found, in which the English chancery has acted, it is evidently because the ecclesiastical courts there have an established jurisdiction, and give a summary remedy in all matrimonial causes. We have no such courts, and no judicature possessing the general powers of those courts. The jurisdiction of equity in cases of fraudulent contracts seems sufficiently comprehensive to include the contract of marriage, and though this may be a new application of the power of this court, I do not perceive that it is an extension of its jurisdiction. It would be deplorable that in a case of fraud so gross there should be no adequate remedy; and to give the same relief in this case which this court gives in other cases of contracts procured by fraud,

is no assumption of any general jurisdiction over matrimonial causes: Reeve's Domestic Relations, 206, 207.

In the case of *Wightman v. Wightman*, 4 Johns. Ch. 343, the late chancellor annulled a marriage between parties of whom one was a lunatic; and the case now before the court belongs still more clearly to the jurisdiction of equity. The authority of this court to divorce in certain cases is a power given by our own statutes, and is entirely distinct from the general jurisdiction of the court in matters of equity. Viewing this contract as one obtained by fraud, and upon this ground alone, I am of opinion that this court has cognizance of the case, and may annul this marriage. The decree will declare that the marriage between these parties was obtained by the fraud of the defendant, and will adjudge it to be utterly null and dissolved.

GIBERT v. COLT.

[1 HOPKINS' CH. 496.]

THE WRIT OF *NE EXEAT* is not a prerogative writ in this state; but is an ordinary process of courts of equity to which suitors, in proper cases, are entitled as a matter of right.

THE WRIT OF *NE EXEAT* may issue against a foreigner or a citizen of another state, while in this state.

IN AWARDING A WRIT OF *NE EXEAT*, the court may consider the defendant's answer, as well as the affidavit filed by plaintiff; and may issue the writ, if the answer shows a sufficient cause, though the affidavit does not.

THE AMOUNT OF THE BAIL on a writ of *ne exeat* is fixed by the court.

MOTION for a *ne exeat*, founded on a petition and affidavit. It appeared that J. L. Dulary died in 1807, leaving the Countess D'Aitz, one of the complainants, sole legatee, and appointing executors, of whom Jacob Le Roy alone qualified; that Le Roy at that time was a partner in business with the defendant Colt, under the firm name of Jacob Le Roy & Son, and the funds of the estate were carried into the accounts of the firm, who charged themselves with interest, from time to time. In January, 1814, a balance was stated in favor of Dulary of eleven thousand nine hundred and thirty-eight dollars and seventy cents; and on the twentieth of May following, Le Roy drew out three thousand four hundred and seventy-eight dollars and sixty-eight cents, and bought four thousand dollars of the six per cents of the United States, for the account of the estate. Le Roy died insolvent in February, 1815, and Colt, his surviv-

ing partner, five days afterwards transferred the stock to one Lawrence, signing to the transfer "Jacob Le Roy & Son, administrators," meaning administrators of Dulary. In consequence of Le Roy's death, Gibert was appointed administrator with the will annexed.

Defendant in his answer alleged that in December, Le Roy, prior to his death, had directed that the stock investment should be re-credited; that Dulary's account with the firm be closed, and the balance carried to Dulary's private account, as was done accordingly in the following entries: "Dr. J. L. Dulary Dec. 3, 1814. Jacob Le Roy transferred to his private account, with interest from first of January last, eleven thousand nine hundred and thirty-eight dollars and seventy cents. Cr. By stock of United States for this sum wrongly charged him, the stock being ours, three thousand four hundred and seventy-eight dollars and sixty-seven cents." Defendant admitted that he was wrong in transferring the stock in the name of Jacob Le Roy & Son, administrators; but insisted that he was entitled to retain the avails of the stock, as well as the residue of the balance, on the ground of the above entries. The petitioners denied that these entries were made in Le Roy's life-time, alleged that no payments had ever been made to their knowledge or belief; averred that by reason of the matters set out in the bill, defendant was indebted to petitioners, including interest in the sum of twenty thousand dollars and upwards, and that the recovery of this amount would be endangered by permitting defendant to quit this state and go to Baltimore, as he was about to do.

Baltimore was the defendant's place of residence. The questions raised were: 1. Whether a citizen of another state, transiently visiting this state, is liable to the writ of *ne exeat*; 2. Whether the statement of a debt due the complainant was sufficiently positive.

Roosevelt, for the petitioners, relied upon *Howden v. Rogers*, 1 Ves. & B. 129; *Dick v. Livingston*, Id. 372; *Woodward v. Shatsell*, 3 Johns. Ch. 412.

D. B. Ogden and Jones, contra, urged that the writ did not run against a citizen of another state; that it was a high prerogative process, and ought to be exercised with caution; that there was no pretense of insolvency, but merely the inconvenience of resorting to another forum; and that the affidavit of indebtedness was not positive: 7 Johns. Ch. 189; 10 Ves. jun. 164; 1 P. Wms. 163.

The Court. The English idea that a *ne exeat* is a prerogative writ is inapplicable here. This writ has now become an ordinary process of courts of equity; and it is as much a writ of right as any other process used in the administration of justice. It must be granted when a proper case is presented. The defendant is a citizen and a resident of another state; but he is nevertheless liable to this writ. Our own citizens, those of other states, and foreigners, are all equally subject to our laws, and to the process of our courts, while they are in this state. There can be no reason that the writ of *ne exeat* should be an exception to this principle, and it has often been used to arrest citizens of other states in this state. The only difficulty in this case arises from the language of the affidavit concerning the debt. Is the affidavit sufficiently positive according to the precedents?

Roosevelt, in reply. The complainants sue in a representative capacity, and have stated the facts with as great certainty as the circumstances admit of. Besides, the answer admits enough to warrant the granting of the writ: Tidd. 165.

The Court. According to the adjudged cases, a positive affidavit of an existing just debt, is required as a foundation for the writ of *ne exeat*; and this rule has been observed with great strictness. Pursuing the decisions, I am of opinion that the affidavit now before the court is not sufficiently positive. But the answer of this defendant is also before the court; and in deciding this question, the court may and ought to take the answer into consideration. From the answer, it seems sufficiently clear, that the complainants are entitled to the stock and the dividends. The residue of the demand is not, upon the answer, sufficiently free from difficulty. I shall direct the writ to be issued for an amount equal to the stock and the dividends. Let it be marked for seven thousand dollars.

The writ having issued, the sheriff now applied to the court for instructions regarding the amount of the bond to be taken. The complainant's counsel contended that the bond should be in double the sum mentioned in the writ; whereas, for the defendant it was urged that that sum, and no more, was the proper amount.

The Court. The practice of the court upon this point does not appear to have been settled. The sum in which the defendant is to be held to bail, upon a writ of *ne exeat*, is assessed

by the court itself; and the court directs a sum sufficient to cover, not only the existing debt, but also a reasonable amount of future interest, having regard to the probable duration of the suit. If this sum were doubled or enlarged by the sheriff, it might be very oppressive to the defendant. The sheriff must take a bond in the sum directed by the court, without any addition.

THE WRIT OF *NE EXEAT* was originally employed as a high prerogative process, for political purposes, to prevent offenders against the state, and the clergy, from leaving the kingdom. The date of its introduction is uncertain. According to Beames and Fitzherbert, it was used during the reign of the second Henry; but being contrary to the absolute right of free locomotion as taught by the common law, its use was done away with by the magna charta, except in times of war. From the reign of King John to that of Edward I., it was occasionally resorted to, and, as instances of its issuance during that time have been definitely ascertained, this period has been fixed by some writers as that which witnessed the creation of the writ. See, upon this subject, 2 Story's Eq. 1465 *et seq.*, and 3 Kent's Com. sec. 33 *et seq.* Not only is the origin of the writ lost in obscurity, but the time when it was first diverted from its office as an instrument of the crown, to subserve the interests of private individuals, is also a matter of speculation. It is generally thought that under the reign of Queen Elizabeth, *ne exeat* was first made use of as a remedial process in enforcing rights in chancery. And the frequency with which it was applied to render effective equitable demands in succeeding years, caused this writ to be made the subject of one of Lord Bacon's ordinances.

Gradually, the peculiarities of this process became defined, and under the practice of the courts of chancery, in England, and in the jurisdictions in this country, where it is still in existence, it has grown to take, in equity, the place occupied by the *capias ad respondendum* at law. It is a writ issuing out of a court of equity, on the petition of a complainant having a clear equitable demand, to prevent the departure of a defendant who has sequestered his property and is about to leave the country. It is a writ to obtain equitable bail: *Dick v. Swinton*, 1 Ves. & B. 372; *Stewart v. Graham*, 19 Id. 312; *Grant v. Grant*, 3 Russell Ch. 598; *Cox v. Scott*, 5 Harris & J. 398; *Shearman v. Shearman*, 3 Brown Ch. 370; *Mitchel v. Bunch*, 2 Paige, 617; *Smedburg v. Mark*, 6 Johns. Ch. 138; *Cable v. Alvord*, 27 Ohio St. 666; *Adams v. Whitcomb*, 46 Vt. 708. *Ne exeat* is a process to hold the custody of the defendant's body until he shall give bail to abide the decree of the court: *Cable v. Alvord*, 27 Ohio St. 667; *Gresham v. Peterson*, 25 Ark. 377. And can be issued only against those whose persons can be touched by the decree of the court either by attachment or on execution: 3 Bl. Com. 213; 3 Dan. Ch. Pr. 1801; *Seymour v. Hazard*, 1 Johns. Ch. 1. Consequently, the writ cannot issue against a female in an action founded on contract: *Adams v. Whitcomb*, 46 Vt. 708.

Judge Foster, speaking of the writ, in *Samuel v. Wiley*, 50 N. H. 353, 355, defined some of its characteristics as follows: "Although formerly only issued under the king's high prerogative, and directed against those machinating and concerting offenses against the crown, it has, at length, been applied to prevent subterfuge from the justice of the nation, though in matters of private concernment: Wendell's note to 1 Bl. Com. 266; 2 Madd. Ch. Pr. 182.

It is now said to be an ordinary process of courts of equity, and has come to be regarded as much a writ of right as any other process used in the administration of justice: See *De Carriere v. De Callone*, 4 Ves. jun. 577, and note. The effect is to hold a party amenable to justice, and to render him personally responsible for the performance of the orders and decrees of the court, by preventing him from withdrawing himself from its jurisdiction: *Johnson v. Clendenin*, 5 Gill & J. 463. It issues only upon an equitable demand, and not where the plaintiff by process of law may hold the defendant to bail: *Atkinson v. Leonard*, 3 Bro. C. C. 218; *Jones v. Sampson*, 8 Ves. jun. 593. It is resorted to for the purpose of obtaining equitable bail, and will be discharged on giving security: *Howden v. Rogers*, 1 Ves. & B. 129. Whenever the defendant intends leaving the state, the complainant, upon producing evidence of such intention, and of his equitable claim, has a right to equitable bail: *Mitchell v. Bunch*, 2 Paige, 617. The writ may be applied for at any stage of the proceedings: *Dunham v. Jackson*, 1 Id. 629. The prayer for the writ need not be inserted in the bill: *Collinson v. —*, 18 Ves. jun. 353; and no notice of motion for the writ is required: *Id.* The writ with all its powers and limitations, and conformable to the English authorities and practice, is clearly recognized in the American courts as a writ of right, in the cases where it is properly grantable: 2 Story's Eq. Jur., sec. 1469; and it is very commonly applied in the chancery practice of the federal courts by virtue of United States laws: Act of Cong., March 2, 1793, ch. 22, sec. 5."

The writ of *ne exeat republica*, seeming repugnant to the spirit of American institutions, has been abolished by express enactment or judicial construction in very many of the states. Yet its place has been filled by other methods of procedure, unlike in name, but similar in effect. By the constitution of Vermont, Pennsylvania, Kentucky, Mississippi and Louisiana, any restraint upon the right of the people to emigrate is prohibited. By legislative act in Arkansas, sec. 4460, the writ is abolished, and in the civil procedure code of New York, taking effect September 1, 1877, a system of arrest and bail is devised as a substitute for the writ. In Ohio, the court, in *Cable v. Alvord*, 27 Ohio St. 654, after a careful consideration of the various statutes of that state, conclude that *ne exeat* is abolished in all civil actions coming within the civil code. And in *Ex parte Harker*, 49 Cal. 465, the court, referring to the section providing the writs and proceedings by which a person may be arrested in a civil action, decide that the writ in question is not included among them, and that, therefore, district courts have no power to issue it.

In those jurisdictions, however, where *ne exeat* is still recognized as a remedial process, the circumstances under which the writ will be granted, and the preliminary requisites to its issuance, are largely regulated by statute. There are, indeed, certain general principles governing in nearly every case, and these are, in a measure, well expounded in the following decision: In *Rhodes v. Cousins*, 6 Rand. 191, it is said: "The *ne exeat*, as now understood and practiced upon, is a proceeding in equity to obtain bail in a case where there is a debt due in equity, though not at law, except in cases of account, and perhaps a few other cases of concurrent jurisdiction. The general rule is, that where you can get bail at law, equity will not grant the writ. In the exercise of this power, courts of equity will be very cautious, as it is a strong step tending to abridge the liberty of the citizen. To induce that court to issue a *ne exeat*, it must appear: 1. That there is a precise amount of debt positively due; 2. That it is an equitable demand, upon which the plaintiff cannot sue at law, except, as before, on

account, and some other cases of concurrent jurisdiction; 3. That the defendant is about quitting the country to avoid payment."

It is the doctrine of all the cases that it will issue only where the ordinary processes of law are insufficient or unavailable against the debtor: *Orme v. McPherson*, 36 Ga. 573; *Hannahan v. Nichols*, 17 Id. 78; *Ramsay v. Joyce*, 1 McMull. Ch. 236; *Hunter v. Nelson*, 5 Blackf. 263; *McDonough v. Raynor*, 18 N. J. Eq. 249; *Edwards v. Massey*, 1 Hawks, 359; *Cable v. Alword*, 27 Ohio St. 663; *Bonesteel v. Bonesteel*, 28 Wis. 245, where it is held that the operation of the writ is not enlarged by the abolition, by the code, of the distinction between actions at law and suits in equity: *Burnsides v. Blythe*, 11 B. Mon. 6; *Gresham v. Peterson*, 25 Ark. 377; *Victor Scale Co. v. Shurtleff*, 81 Ill. 313. In the Revised Statutes of Illinois, p. 716, ch. 97, sec. 1, it is provided that it shall not be necessary to authorize the granting of such writ that the applicant should show that his debt, or demand, is purely of an equitable character, and only cognizable before a court of equity. The exceptions alluded to in *Rhodes v. Cousins*, *supra*, are stated in Story's Eq., sec. 1471, to be cases of divorce and alimony, and matters of account between partners.

To the issuing of the writ it is no objection that the land, the subject-matter of the bill, is without the state, provided the decree may be enforced by acting on the person of a party: *Enos v. Hunter*, 9 Ill. 211. Nor need the defendant be actually in the state when the writ is applied for: *Parker v. Parker*, 12 N. J. Eq. (1 Beas.) 105; nor a resident: *Id.*; *Woodward v. Schatzell*, 3 Johns. Ch. 412; *Gilbert v. Colt*, 1 Hopk. Ch. 496; nor a citizen or subject; nor need the demand arise within the state: *Woodward v. Schatzell*, *supra*, citing the English cases in point.

The writ is grantable only upon a bill or affidavit setting forth the facts and asking the relief which complainant urges as necessary to his protection and the recovery of his claim. It must appear that the claim is one not enforceable at law, cases heretofore cited; is in its nature pecuniary, and is certain in amount or capable of being made certain: *Graham v. Stucken*, 4 Blatchf. 50; *Mattocks v. Tremain*, 3 Johns. Ch. 75; *McDonough v. Gaynor*, 3 C. E. Gr. 249. Where the balance between the parties is yet to be ascertained by an account and settlement, it is sufficient in an affidavit for the complainant to swear to his belief that a certain sum is due him: *Clayton v. Mitchell*, 1 Del. Ch. 32. The petition must show by facts detailed that the defendant has been guilty of fraud, or that there is a strong presumption of fraud: *Malcolm v. Andrews*, 68 Ill. 100. Mere apprehensions of the plaintiff will not warrant a writ of *ne exeat*: *Cox v. Scott*, 5 Har. & J. 384; *Williams v. Williams*, 3 N. J. Eq. (2 Green) 130; *Rhodes v. Cousins*, 6 Rand. 188. It is also essential for the affidavit to show that the defendant is about to leave the state: *Orme v. McPherson*, 36 Ga. 573; *Yule v. Yule*, 2 Stock. 138; *Gresham v. Peterson*, 25 Ark. 377; *Houseworth v. Hendrickson*, 27 N. J. E. 60. But the affidavit will be sufficient if it is positive as to the defendant's intention to go, although upon knowledge and belief only, as to preparations and threats: *Moore v. Gleaton*, 23 Ga. 42. And further the applicant must set forth in his affidavit or bill that the defendant, about to depart, has disposed of, or is about to remove his property: *Fitzgerald v. Gray*, 59 Ind. 254; *Dean v. Smith*, 23 Wis. 483; and that the property sold by the defendant with intent to depart was not exempt from execution: *Jones v. Kennicott*, 83 Ill. 484. It is not fatal to the petition for the writ that all the parties jointly liable as defendants or interested as plaintiffs are not joined in the proceeding: *Fitzgerald v. Gray*, 59 Ind. 254. Nor will the affidavit be insufficient where it refers to the facts set out in the complaint, without repeat-

ing them, if they entitle the plaintiff to the writ: *Clayton v. Mitchell*, 1 Del. Ch. 32.

The absence of any of the formalities essential to the valid issuance of the writ, may be taken advantage of on motion to have the same set aside. It is said, in *Harris v. Hardy*, 3 Hill, 393, that objections to the regularity of the writ should be raised at the earliest opportunity after suit brought, while in *Miller v. Miller*, Sax. 386, an application to discharge the writ was pronounced in season where it was made before the cause was noticed for final hearing. Where there is an adequate remedy at law, the writ will be dissolved: *Hawthorn v. Kelly*, 30 Ga. 965, and cases above cited, prescribing a resort to equity necessary as the only means of relief. Upon giving security the writ will be discharged, of course: *McNamara v. Dwyer*, 7 Paige, 236. A *ne exeat* issued by a judge at chambers, and signed by him, but not signed by the clerk, nor sealed with the seal of the court, is void: *Bonesteel v. Bonesteel*, 28 Wis. 245; so, also, when served on Sunday: *Jewett v. Bowman*, 27 N. J. Eq. (12 C. E. Gr.) 275. A writ obtained upon affidavits substantiating declarations and acts of the defendant, as evidence of his intention to depart, will not be discharged upon a counter affidavit by the defendant denying the intention: *Houseworth v. Hendrickson*, Id. 60. Nor where the counter affidavits fail to rebut the presumption of the defendant's bad faith to the complainant: *Myer v. Myer*, 25 Id. (10 C. E. Gr.) 28. If the court should feel constrained to dissolve the writ, it may, nevertheless, require security to abide the decree: *McDonough v. Gaynor*, 20 N. J. E. (3 C. E. Gr.) 249.

BURTIS v. BURTIS.

[1 HOPKINS' CH. 557.]

HISTORY OF THE EARLY DIVORCES and divorce law of New York stated.

THE ENGLISH LAW OF DIVORCES is the ecclesiastical, and not the common law of that country. It was never adopted in this state.

CAUSES FOR DIVORCE are such only as are specified in the statute of this state.

CORPORAL IMPOTENCE, not being recognized in the statute as a ground of divorce, this court has no authority to adopt the law of England or any other country, and grant a divorce on such ground.

BILL for a divorce on the ground of the impotency of complainant's husband.

Buel, for the defendant, objected to the bill on the ground that impotence was not a statutory cause for divorce.

Wendell and Viele, contra, cited 1 Bl. Com. 440; Co. Lit. 235 a.; 1 Anderson, 185; 5 Co. 98 b.; *Morris and Webber's case*, 2 Leon. 169; Dy. 179 a.; *Earl of Essex's case*, 1 St. Tr. 315; *Bury's case*, 10 Id. 23, in support of the position that impotence was good cause for annulling a marriage, and contended that the peculiar and exclusive jurisdiction of a court of chancery embraced causes where its interference was necessary to prevent a wrong.

SANDFORD, Chancellor. When New York became a province of England, it was for some years ruled by a governor, or a governor and council, and during that period, the governor, either alone or in conjunction with the council, seems to have exercised all magistracy, executive, legislative, and judicial. During that period, one of the governors, Lovelace, granted four divorces, of which, one was in 1670, and the other three in 1672. These are the only instances of divorce which appear to have taken place in the colony, during that long period, in which New York was a province of England. In 1683, the people were admitted to a participation of the legislative power, and from that time laws were enacted by the colonial legislature. The colony never had any court possessing jurisdiction of matrimonial causes, or power to grant divorces. No statute defining causes of divorce or authorizing divorce, in any case whatever, was ever enacted by the legislature of the colony. Some special applications for divorces were made to the colonial legislature, but all such applications were refused. The governor of the colony, with the consent of the council, had power to establish courts of justice, and all the courts of the colony derived their origin from this source of authority; but no court, having cognizance of matrimonial causes or divorces, was ever established in the colony. No court of the colony exercised any such jurisdiction, and no law concerning divorce was ever enacted by the colonial legislature. The four divorces granted by Governor Lovelace must be regarded as extraordinary acts of power by a chief magistrate, who possessed very great and indefinite authority; they were the acts of one governor; they stand alone in the history and practice of the English colony, and they afford no proof of any law of the colony authorizing divorces. According to all the information which I can obtain from records or otherwise, it appears that no divorce took place in the colony of New York, during more than one hundred years preceding the time when the colony became a state, and that the only divorces which ever took place in the colony were the four granted by Governor Lovelace, in 1670 and 1672. Thus it appears that the law of England, concerning divorces and matrimonial causes, was never adopted in the colony of New York. It was not adopted in fact or in practice, and it was never the law of the colony. By the constitution of the state, adopted in 1777, such parts of the common law of England, and the statute law of England and Great Britain, and of the acts of the legislature of the colony, as together formed the law of the

colony, on the nineteenth day of April, 1775, were declared to be the law of this state. The law of the colony was thus adopted as the law of the state. The law of England concerning divorces and matrimonial causes, not forming a part of the law of the colony, did not become the law of the state.

During more than ten years after the colony became a state, there was no law authorizing a divorce in any case whatever. On the thirtieth day of March, 1787, the legislature passed a statute entitled an "act directing a mode of trial, and allowing of divorces in cases of adultery." The preamble of this law was expressed in the following terms: "Whereas, the laws at present in being within this state, respecting adultery, are very defective, and applications have, in consequence, been made to the legislature, praying their interposition; and whereas, it is thought more advisable for the legislature to make some general provision in such cases, than to afford relief to individuals, upon their partial representations, without a just and constitutional trial of the facts." This was the first law in this state authorizing a divorce, and it was confined to the case of adultery. It continued to be the only law, until the ninth day of April, 1813, when the legislature made a new and extensive provision for divorces. By the statute then enacted, the wife may obtain a divorce from her husband where he has been guilty of cruel and inhuman treatment towards her, or such conduct as renders it unsafe and improper that she should cohabit with him, or where he has abandoned her and neglects to provide for her. The provisions last mentioned were, by a statute of the tenth day of April, 1824, extended to husbands against their wives. Such is the history of our own law concerning divorces, and its actual state is found in these statutes now in force. I cannot admit that we have another code on the same subject, and that the laws of England concerning divorces are also laws of this state. The English law concerning divorces and causes of divorce as it exists now, and as it existed while this state was a colony, is, chiefly, the ecclesiastical law, and not the common law of that country. It is administered by judges and courts whose jurisdiction has never existed either in the state or the colony of New York; and it was evidently regarded by our ancestors of the colony and of the state, as no part of the common law which they adopted.

Our statutes are, clearly, original regulations, intended to authorize divorces in cases in which no divorce could before be obtained. They define the causes for which divorces shall be

granted, they give jurisdiction of those cases to this court, and they give no other jurisdiction. The specified cases are, with some differences, causes of divorce by the laws of England; but these statutes are evidently founded on the supposition that the causes of divorce which they define were not causes of divorce by any pre-existing law in force in this state. To consider these statutes as an adoption of the English law of divorces, would be a violent perversion of the language and intention of the legislature. Such a construction of these laws would, in effect, declare that statutes authorizing divorces in certain cases particularly specified, also authorize divorces in a multitude of other cases not specified. Had the legislature considered the English law of divorce as the law of this state, they would probably have authorized some tribunal to administer that law; but they have conferred no such authority; and they have cautiously limited and regulated the power of divorce as an innovation upon the pre-existing law of the state. If the power to divorce for one cause could imply a power to divorce for a different cause, the statute of 1787, authorizing divorces for adultery, might have authorized divorce for cruel treatment or desertion, and the subsequent statutes would have been unnecessary. But the legislature, entertaining no such opinion, have advanced by successive steps, and have authorized divorces by not adopting or recognizing any foreign, but by their own acts of legislation. The causes of divorce and the jurisdiction of this court are equally prescribed by these statutes; the jurisdiction is given in the defined cases, and these laws confer no jurisdiction or authority to divorce in any other case. In every view of these acts of our legislature, they are substantive laws, authorizing divorces in the cases which they specify, and not authorizing divorce in any other case or for any other cause.

It would be useless here to inquire, whether these laws have provided adequately and wisely for all the cases in which divorces should be allowed. According to the opinion of some, the great interests of society are best consulted by treating marriage as an indissoluble contract in all cases whatever, and this opinion seems to have prevailed in the colony of New York, and in the early age of the state. To others, this rule of policy has appeared far too severe; and they have held that the welfare of society is best promoted by separating the parties, when their happiness is destroyed, and the legitimate ends of matrimony wholly fail. The regulation of civilized societies, concerning divorces, differ widely according to the different

views of expediency; and in every state it is the province of the lawgiver to establish positive rules on this subject. Our own legislature have decided for ourselves; their views of expediency concerning divorce are found in the laws which they have enacted; and when the legislature shall deem it expedient to authorize divorces for causes not embraced by the existing laws, they will enact new provisions.

The divorces thus allowed and regulated by statute are for causes occurring after marriage; and we have no statute regulating marriage itself. The important contract still depends on the principles of the common law. Those principles are applied by all our courts in the cases and proceedings which belong to their respective jurisdictions, when it is necessary to determine that a marriage is valid or void, but we have no judicature authorized to determine by substantive and effectual sentence that marriages are legal or illegal, and to separate persons who are illegally married. The want of a judicature possessing such an authority is an imperfection; but every court of this state is confined to its allotted jurisdiction, and it belongs to the legislature to provide a remedy for this defect. Two decrees annulling marriages have been made by this court in cases not comprehended by our statutes concerning divorces. In the case of *Wightman v. Wightman*, 4 Johns. Ch. 343, one of the parties was a lunatic; and in the recent case of *Ferlat v. Gojon*, the marriage had been procured by an atrocious fraud. These marriages are clearly void; and this court pronounced the sentence of nullity. If these two decrees are denominated divorces, they did not arrogate to this court any general power of divorce, in cases not prescribed by our statutes. The power of this court to vacate contracts obtained by fraud is an unquestioned breach of its jurisdiction; a gross fraud in obtaining a marriage seems to fall within this jurisdiction; and the court adjudged such a marriage void. But the cases in which this court can annul marriages, in virtue of its powers as a court of equity, must be few and very peculiar; and they must appertain to the jurisdiction of equity.

The cause for which this court is now asked to dissolve a marriage is corporal impotence on the part of the husband. This fact is not a cause of divorce by our statutes; and it is impossible to yield to this suit without adopting the law of England, or some other country, concerning divorces, as the law of this state. If a divorce can be granted for this cause, the whole catalogue of causes allowed by the laws of England may be

equally adopted; the acts of the legislature and the policy of the state respecting divorces, would be superseded by the doctrines of a foreign code, and a power hitherto unknown in this state would be exercised. The corporal impotence of the husband is a cause of divorce in England, and by the laws of most countries, but it is not a cause of divorce by the laws of this state. The suit must, therefore, be dismissed.

The suit was accordingly dismissed, but without costs.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WILSON v. TWITTY.

[3 Hawks, 44.]

SHERIFF'S SALES.—The duty of the sheriff is to conduct the sale in such a manner as will produce the most money.

SALES, EN MASSE.—A sale *en masse* of two tracts, near to but not adjoining each other, is not void. If the defendant acquiesces in the sale, and does not move to vacate it, he cannot recover the lands sold.

FAILURE TO SELL PERSONALTY before resorting to real estate, if occasioned by the defendant, is not a ground on which to impeach the sale.

EJECTMENT, the plaintiff's lessor claiming under a sheriff's deed. It appeared at the trial that the land in question, which consisted of two distinct tracts, was levied upon and sold by the sheriff in one mass, under an execution issued against Allen Twitty, one of the defendants, in favor of Ann Waters. The execution was issued at the instance of the plaintiff's lessor who was interested in the judgment. Twitty was the lawful owner of both tracts, and he and his sons, the other defendants, were in the possession thereof at the time of sale, and when this action was brought. The plaintiff's lessor being the highest bidder, the land was sold to him at eight hundred dollars, less than the amount of the judgment. It did not appear that either he or the sheriff knew that the land was composed of separate tracts, the defendant, Allen Twitty, having simply informed the sheriff, upon inquiry, that he had ten hundred and fifty acres in that part of the country. Certain negroes were levied on under the same execution, and were left with the defendant, Allen Twitty, who gave the sheriff a bond to produce them on the day before the sale, but they were not so produced, and one of the defendant's sons appeared at the sale, claimed the negroes, and

forbade their sale. At a subsequent day some of the negroes were sold. The defendants claimed that the sale of the land was irregular, because the land was sold in one body, and before the negroes were sold; that the sale of all the negroes would have satisfied the execution, and that the plaintiff's lessor being interested in the judgment, was bound by these irregularities.

The jury were charged that if they should find that there was any fraud or collusion between the sheriff and the purchaser in the conduct of the sale, their verdict should be for the defendants. It is not deemed necessary to insert the instructions on other points, as they were in substantial accord with the views expressed in the following opinion. Verdict for the plaintiff's lessor, and judgment thereon, after refusing a new trial, from which judgment the defendants appealed.

Gaston, for the appellants.

Ruffin, for the appellee.

By Court, HALL, J. It is much to be regretted that a more particular rule of conduct has not, by the law, been prescribed to sheriffs in sales of landed property under execution. A difficulty exists in this country (which the law has not provided for), from the circumstance that most of the lands are uncultivated and covered with wood, and on that account their boundaries are more difficult to be ascertained; and it has not been made the duty of sheriffs to set forth their boundaries in their advertisements, or to make them known particularly, on the day of sale. They have not been required to ascertain and set them forth in any better way than they are enabled to do from common report, and from the common channels of information through which people generally acquire a knowledge of them. The practice has been to put up the land for sale by a general description of it, as the land on which the defendant lives, or his lands lying on such a water-course, or, as known by such a name. It has not been made the sheriff's duty to ascertain and make known the title, whether it be held under one or more grants, or deeds, or from whom the defendant purchased it. I believe it is not usual to sell at once two unadjoining tracts, nor do I know that it is forbidden in express terms. It is surely the sheriff's duty to sell in that way that will likely be most beneficial for both parties; I mean in that way that will produce the most money.

In the present case the lands were adjacent to each other.

but were held under different titles, and did not lie adjoining to each other, but their boundaries were not far apart. It did not appear that this fact was known either to the sheriff or to the purchaser. It was woodland that separated them. Twitty, with the exception of his son's possession, was possessed of, and claimed title to, all the lands, and told the sheriff that he had one thousand and fifty acres in that part of the country. It seems that all the lands, when sold, did not produce as much money as the execution called for; and if the lands had been sold in separate lots, one probably would not have sold for more than both together brought when sold together. The question of fraud had been fairly left to the jury; they have been directed to find for the defendant, if there was fraud practiced, either by the sheriff or purchaser. Of course, no inquiry is to be made of that at this time.

Another circumstance may be here noticed, and that is, why did not the defendant object to the sale, at the return of the execution; there would have been less difficulty then in setting aside the sale, if it had been made with loss to the defendant, on account of any misunderstanding, either of title or location. But the purchase-money was suffered to be paid, and there has been an acquiescence under the sale, until the bringing of this action. The sheriff was not to blame for not selling the personal property first; the negroes were kept back by the defendant himself; he, therefore, ought not to complain on that account.

Without, therefore, adopting rules for the government of sheriffs which have not been prescribed and enforced heretofore, and from a view of the whole case, and circumstances attending it, I am of opinion that the rule for a new trial should be discharged.

The rest of the court concurred.

SALES EN MASSE.—The doctrine of the principal case on this point is approved in *Thompson v. Hodges*, 3 Hawk, 51; and in *Huggins v. Ketchum*, 8 Ired. 70. In the latter case a sheriff, having an execution against two defendants, who each owned an undivided one fifth part of a tract of land, sold both interests together, and it was held that unless there was fraud or misconduct in the sale it would not be void. The generally prevalent doctrine is that a "lumping sale" of distinct and unconnected tracts, under an execution, is voidable only; and so where more of an entire tract is sold than is necessary: See note to *Patterson v. Carneal*, 13 Am. Dec. 21: *Chattels cannot be sold en masse on execution except under special circumstances*; *McLeod v. Pearce*, 11 Am. Dec. 742, and note.

PLUMMER v. GHEEN.

[3 HAWES, 66.]

MALICIOUS PROSECUTION.—If the defendant was guilty, he cannot sustain any action, though the motive of the prosecutor was malicious; nor is the prosecutor liable if he prosecute from apparent guilt arising from circumstances which he honestly believes.

MALICIOUS PROSECUTION—PROBABLE CAUSE.—What constitutes probable cause is a question both of law and of fact. If the defendant had, in the opinion of the jury, a probable ground for suspicion, this amounts in law to probable cause.

INSTRUCTIONS, WHAT THE PARTIES ARE ENTITLED TO.—A party, if there be any evidence tending to prove a fact, has a right to an instruction from the court on the law resulting therefrom.

CASE in two counts; one for slander, in charging the plaintiff with perjury; and the second for a malicious prosecution on said charge. Plea, justification. At the trial, the speaking of the words charged in the first count, was proved, also the arrest of the plaintiff for perjury, on a warrant sworn out by the defendant, and his subsequent discharge; an indictment upon which the defendant was marked as prosecutor, having been returned by the grand jury "not a true bill." There was much conflicting evidence upon the point as to whether the defendant had probable grounds for charging the plaintiff with perjury, and the substance of the testimony on that subject is sufficiently stated in the opinion.

The presiding judge, having been prayed to charge, that, if the witnesses were to be believed probable cause was made out, did not do so, but instructed the jury, that, if the circumstances were such as to warrant a reasonable suspicion in the defendant's mind that the plaintiff had perjured himself, probable cause was sufficiently made out; that, although the question of probable cause was partly one of law, yet it was so far dependent on the facts and on the inferences to be drawn therefrom, of which the jury were the exclusive judges, and the evidence was so conflicting, that the court deemed it most proper to leave it to the jury, on the second count, to say whether the defendant had not this probable ground for suspicion amounting to probable cause; that, if they thought so they must find for him on that count, and that, if they found for the plaintiff, their verdict might be general on both counts, or on one only. General verdict for the plaintiff, and judgment thereon after overruling a motion for a new trial, whereupon the defendant appealed.

Ruffin, for the appellant, insisted that the question of probable cause was one of law; that it should not have been left to the jury to say whether reasonable suspicion amounted to probable cause; and that the court should not have declined to instruct on a point of law plainly arising: *Johnson v. Sutton*, 1 T. R. 544; *Legget v. Blount*, N. Car. T. R. [7 Am. Dec. 702].

TAYLOR, C. J. The most material ground of this action is, that a legal prosecution was carried on against the plaintiff, without probable cause, and this it was incumbent on him to prove expressly, for it cannot be implied. Where probable cause is absent it is usual to imply malice, as well as the knowledge of the defendant; but the want of probable cause cannot be implied from the most express malice. If a man prosecute another, from real guilt, however malicious his motives may be, he is not liable in this action; nor is he liable if he prosecute him from apparent guilt, arising from circumstances which he honestly believes. These principles have been repeatedly laid down and sanctioned, and are necessary to be kept in view in considering the nature of the action: 1 T. R. 544.

In order to repel the *prima facie* evidence of the want of probable cause, arising from the indictment not being found a true bill, the defendant introduced several witnesses for the purpose of showing that the plaintiff swore falsely, in two particulars, upon the trial of the warrants before the magistrates. These were: 1. As to the nature of the contract between Mr. Winders and Robison, whether the rent was payable in money or corn, at the option of the former; 2. Whether the money was due presently, or payable in two months. Much evidence, on this first point, was adduced on both sides, to the end of showing, on the part of the plaintiff, that the contract was absolute for the payment of money, as he had sworn it to be; and on the part of the defendant, that there was an option in the tenant to pay money or corn; and that consequently, the plaintiff had perjured himself. Whether he did or not depended on the weight and credibility of much conflicting evidence; but if the jury believed that adduced by the defendant, it is incontrovertible that there was probable cause for the prosecution; if, on the other hand, they believed that introduced by the plaintiff, there was not, on this part of the case, any probable cause, and malice was to be inferred; and this, I apprehend, is the instruction that ought to have been given by the judge.

On the second point the plaintiff swore, at the first trial, that he did not remember when the money was to be paid, whether in two, three, six months, or ever. On the second trial, which was shortly afterwards, he swore that the money was to be paid within two months; and it was on this occasion, when Mr. Winders called to the plaintiff's recollection what his testimony had been on the first trial, that the defendant demanded a warrant against him. On this part of the case it should have been submitted to the jury, to inquire whether the plaintiff's two oaths were in conflict with each other; and even if they were not, whether the circumstances were such as to produce apparent guilt, and raise a belief in the defendant, that the plaintiff had perjured himself? And that in either of these two cases, the defendant should be acquitted on this part of the case.

As the question of probable cause is compounded of law and fact, the defendant had a right to the opinion of the court, distinctly on the law, on the supposition that he had established, to the satisfaction of the jury certain facts. Whether the circumstances was true, was a question for the jury; whether being true, they amounted to a probable cause, is a question of law.

It is true that the court explained to the jury what probable cause was, and explained it correctly; but then, in the subsequent part of the charge, it is left at large for the jury to say whether the defendant had not this probable ground for suspicion, amounting to probable cause. Whereas the right instruction was, that if the defendant had, in their opinion, this probable ground of suspicion, it amounted, in point of law, to probable cause. I am of opinion, therefore, that there ought to be a new trial.

HALL, and HENDERSON, judges, concurred.

MALICIOUS PROSECUTION.—As to the necessity of both malice and want of probable cause to support an action for malicious prosecution, and as to what will amount to probable cause, see the note to *Frowman v. Smith*, 11 Am. Dec. 265.

MALICIOUS PROSECUTION OF CIVIL SUIT.—See on this subject the note to *Williams v. Hunter*, post.

TOLAR v. TOLAR.

[3 HAWES, 74.]

WILL, WORDS TO PASS REAL ESTATE.—A will of "all I possess, indoors and outdoors," is sufficient to pass real estate.

PETITION for partition of certain lands in which the plaintiffs claimed to be tenants in common with the defendants, as heirs at law of Matthias Tolar, the said plaintiffs being his children by a former wife, while the defendants were his children by his second wife. The defendants claimed under the will of their father, in which he gave the plaintiffs a shilling each, and then disposed of his property as follows: "I, Matthias Tolar, do give and bequeath unto my wife, Sally Tolar, all that I possess indoors and outdoors, except she should get married, and if she does, then to my two daughters, Maria and Harriet," the defendants. The testator's widow, Sally, married before the filing of the petition. The personal estate of the testator, which was small, was exhausted in paying debts, leaving the lands in controversy, which were the bulk of his property. The court below dismissed the petition upon these facts, and the petitioners appealed.

TAYLOR, C. J. The testator had a wife and four children; two of them, by a former wife, lived separate from him, without his consent. The bulk of his property consisted of the tract of land on which he lived, and a very inconsiderable personal estate, which was exhausted in the payment of his debts. In his will, he manifests his displeasure towards his two elder children by giving them a shilling each, influenced no doubt by the common, but erroneous, notion that it is necessary to give something to a child in order effectually to disinherit him. After these bequests, it is quite improbable that he meant to die intestate as to his real estate, so as to let these two children share with the others; and where the intent is so apparent, too much stress ought not to be laid on the strict signification of words. He could not but know that his personal property was inadequate to the support of his wife during her widowhood, and that a remainder of it to his younger children would be illusive. The words "what I may die possessed of," have been held sufficient to describe property of whatever description: 8 Ves. 606; and the words "all I am worth," are sufficient to pass real estate: 1 Bro. C. C. 437.

The petition must be dismissed.

WHAT WORDS IN A WILL PASS REALTY.—From the fact that wills are frequently written by unlearned persons, and under most painful and distracting circumstances, and are, therefore, very inartificially drawn, it would be obviously unjust to require that they should describe the property which they are intended to pass, with technical accuracy, particularly where land titles are concerned. It is accordingly settled that no such nicety of expression is necessary. Lands will pass under a devise whatever may be the terms used if, from the whole will, it can be gathered that such was the intention of the testator. Indeed, as is indicated by the significant name given to instruments of this nature, it is the "will" of the testator, which must govern, if it can be ascertained. His intention is the master-key which the court will always use to unlock the hidden meaning of the terms which he has employed. Necessarily, therefore, each case stands by itself, and no uniform rule of construction can be applied. As is well said by Dallas, C. J., in *Doe v. Gilbert*, 3 Brod. & B. 85: "Every case of this sort depends on its own peculiar circumstances; for in every case the question is one of construction to be made on the whole of the will; every case, therefore, is individual, and to be looked at with much caution." Precedent is an unsafe guide where the same word is used by different testators, in ignorance of its real meaning, and each understanding it in a way peculiar to himself. Says the learned Buller, J., in *Smith v. Coffin*, 2 H. Bl. 444: "Cases of this sort depend on niceties of expression, and sometimes even on a single word, and as it has been frequently said, the nonsense of one man cannot be a guide for that of another. But the question always must be, what was the intention of the testator? That is the polar star by which we must be guided. Where it is apparent in the introductory part of the will, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clause may include real estate, that clearly is to be taken in the largest sense, in order to correspond with the introductory part."

"PROPERTY" AND "ESTATE" are generic words, and as their popular meaning includes both realty and personalty, so are they construed by the courts in interpreting wills. Hence, where a testator employs in his will the words, "all my property," or "estate," or "the rest of my property," or "estate," the prevailing rule now is to construe these expressions as including both real and personal property, unless it is apparent from some other part of the will that the testator used the words in a different sense: *Kennos v. McRoberts*, 1 Am. Dec. 428; *Mayo v. Carrington*, 2 Id. 580; *Jackson v. Delaney*, 7 Id. 403; *Beachcroft v. Beachcroft*, 2 Vern. 690; *Tanner v. Morse*, Cas. t. Talb. 284; *Tilley v. Simpson*, 2 T. R. 659 in notis; *Fletcher v. Smiton*, Id. 656; *Jongema v. Jongema*, 1 Cox Ch. 362; *Rashleigh v. Master*, 1 Ves. jun. 201; *Church v. Munly*, 15 Id. 396; *Scott v. Alberry*, 1 Com. 337; S. C., 8 Vin. Ab. 228, pl. 14; *Doe v. Chapman*, 1 H. Bl. 223; *King v. Shrivies*, 5 Simons, 461; *Churchill v. Dibben*, 9 Id. 547; *Day v. Dameron*, 12 Id. 200; *Midland Co. R. v. Oswin*, 1 Coll. 74; *O'Toole v. Browne*, 3 El. & Bl. 572; *Patterson v. Huldart*, 17 Beav. 210; *Meeds v. Wood*, 19 Id. 215; *Re Greenwich Hospital*, 20 Id. 458; *Hawthornth v. Hawthornth*, 27 Id. 1; *Saumarez v. Saumarez*, 4 My. & Cr. 331; *D'Almaine v. Moseley*, 1 Drew. 629; *Footner v. Cooper*, 2 Id. 7; *Doe v. Lainchbury*, 11 East, 290; *Doe v. Langlands*, 14 Id. 370; *Doe v. Morgan*, 6 Barn. & C. 512; S. C., 9 Dow. & R. 633; *Doe v. Evans*, 9 Ad. & El. 719; *Doe v. Walker*, 15 Id. 28; *Mayor v. Hodsdon*, 6 Moore P. C. C. 76; *Lloyd v. Lloyd*, L. R. 7 Eq. Cas. 458; *Edwards v. Barnes*, 2 Bing. N. C. 252; *Beall v. Holmes*, 6 Har. & J. 205; *Jackson v. House*, 17 Johns. 231; *Godfrey v. Humphrey*, 18 Id. 537; *Bullard v. Goffe*, 20 Id. 252;

Hunt v. Hunt, 4 Gray, 190; *Kellogg v. Blair*, 6 Met. 322; *Laing v. Barbour*, 119 Mass. 523; 1 Jarman on Wills, 692; 2 Redf. on Wills, 311. So where the expression is "testamentary estates," *Smith v. Coffin*, 2 H. Bl. 444; *Doe v. Gilbert*, 3 Brod. & B. 85. Or "personal estates," where the subsequent dispositions indicated that such was the testator's intention: *Doe v. Tofield*, 11 East, 246.

But where such a general term as "property" or "estate," which would otherwise include realty, is coupled with testamentary directions applicable only to personalty, it will be held not to include real estate: *Doe v. Hurrell*, 5 Barn. & Ald. 18; *Doe v. Rout*, 7 Taun. 79. So where subsequent particulars, as to the nature of the property, clearly indicate that the testator had only personalty in contemplation: *Timewell v. Perkins*, 2 Atk. 102; *Smith v. Hutchinson*, 61 Mo. 83. So, where in referring to the bequest, the testator directs that the "interest" be added to the "principal," etc.: *Doe v. Buckner*, 6 T. R. 610. And where a particular devise of realty is made in a will the use of a general term, such as "property" or "estate," in a codicil, will not be permitted to cut down such prior devise: *Molyneux v. Rose*, 25 L. J. Ch. N. S. 570. So the words "estate" and "property" were held, in *Good v. Holderness*, 20 Beav. 147, to apply only to personalty, because there were no words of inheritance, the gift being to the legatee "his executors and administrators," and there were subsequent provisions in the will relating to the "income" and the "principal." In *Smith v. Hutchinson*, 61 Mo. 83, there was a particular devise of certain land, which was all the realty that the testator owned, at the time of making the will, and the testator then gave "all of his other property, consisting of horses, cattle, sheep and hogs, money and effects whatsoever" to his residuary legatee, and it was held that a tract of land entered subsequently to the making of the will, did not pass by these words. The earlier cases generally adopted a much more stringent rule of decision on this subject than the later ones. Formerly the words "property" and "estate" were held to refer only to personalty unless there was something in the context to show that the testator intended a more enlarged meaning, while now the doctrine is that such terms must be understood, according to their popular acceptation, to include both realty and personalty, unless their application is restricted by other parts of the will: 2 Redf. on Wills, 310, and cases cited. It was held in *Brown v. Dysinger*, 1 Rawle, 408, in accordance with the old rule, that "any earthly property" did not refer to real estate because there were no words of inheritance or perpetuity used.

"EFFECTS."—This term, when used in a will, is generally construed to refer to personalty only, unless there is something in the context to require a more extended application. Thus, in *Doe v. White*, 1 East, 33, the testator gave his "effects wheresoever and whatsoever, and of what nature, kind or quality soever, save and except my wearing apparel;" and it was held that, there being nothing in the will to show the contrary, this was a mere bequest of personalty. So in *Doe v. Dring*, 2 Man. & Sel. 448, the term "effects" was held to include only personal property. But see *Doe v. Trout*, 15 East, 394; and *Milsome v. Long*, 3 Jur. N. S. 1073. So in *Henderson v. Farbridge*, 1 Russ. 479, it was held that the words, "I give and bequeath all my effects after paying of every due demand," "what little I have left to call my own," would not carry an equity of redemption in a copyhold estate. And in *Doe v. Earles*, 15 Mees. & Wels. 450, the majority of the court held that "all my effects," in a will, would not pass a remainder in fee. Lord Langdale, in *Titchfield v. Horncastle*, 2 Jur. 610, said that in his opinion the term "effects"

ought to apply to all the results of a man's industry, to all his acquisitions, whether real or personal, and that such was the construction prior to Lord Mansfield's time, but that since then it had generally been held more peculiarly applicable to personality. But where the term used is "real effects," it means real property: *Torrington v. Bowman*, 22 L. J. Ch., N. S., 236. So, the term "said effects," applies equally to realty and personality, where it is used with reference to a previous devise of both classes of property: *Doe v. White*, 1 East, 33.

OTHER GENERAL EXPRESSIONS WHICH WILL PASS REALTY are such as the following: "Whatsoever else I have not before disposed of:" *Hopewell v. Ackland*, 1 Salk. 239; S. C., 1 Com. 164; "All I am worth:" *Huxtep v. Brooman*, 1 Bro. C. C. 437, doubted apparently in *Wills v. Wills*, 1 Dr. & War. 439, but approved in *Doe v. Rout*, 7 Taun. 79, and in *Davenport v. Coltman*, 9 Mees. & Wels. 481; "All I have," "All I am worth:" *Doe v. Morgan*, 6 Barn. & C. 518; S. C. 9 Dow. & R. 633; 13 Eng. Com. L. 518; "All the rest of my worldly goods, bonds, notes, book debts and ready money:" *Wilce v. Wilce*, 7 Bing. 664; "Everything that I may die possessed of:" *Phillips v. Beal*, 25 Beav. 25; *contra*, *Monk v. Hawdsley*, 1 Simons, 286; "My mind and will is, that my wife have one moiety of what is left after my debts paid:" *Beachcroft v. Beachcroft*, 2 Vern. 690; "Whatsoever I may die possessed of:" *Davenport v. Coltman*, 9 Mees. & Wels. 481. So, where the words were "all my cash, notes and book accounts, with whatsoever is not named that I have any right or claim to either in law or equity," it was held that they would carry a reversion in realty, where the will had previously disposed of all the rest of the testator's estate: *Harper v. Blean*, 3 Watts, 471. And the word "legacy" will include land if the context indicates that such was the testator's intention: *Hope v. Taylor*, 1 Burr. 268. The phrase "worldly goods," where the gift is to one and his "heirs," has been held to pass realty: *Wright v. Shelton*, 18 Jur. 445. So, where the words were "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid. I do hereby appoint R. P. my residuary legatee and executor;" followed by certain specific legacies, annuities and recommendations, it was held that the realty would pass to the residuary legatee: *Pitman v. Stevens*, 15 East, 505. See also, *Lindsay v. McCormack*, 12 Am. Dec. 387; *Grayson v. Atkinson*, 1 Wils. 333; *Hogan v. Jackson*, 1 Cowp. 299; *Ferguson v. Zepp*, 4 Wash. C. C. 645; and on the other hand, see *Wheaton v. Andress*, 23 Wend. 452. The word "fortune" was held, in *Maitland v. Adair*, 3 Ves. 231, to mean merely money legacies. And in *Bradford v. Bradford*, 6 Whart. 236, it was decided that the words "worldly goods, of all sorts and kinds" are properly applicable to personal property alone.

TATE v. SOUTHARD.

[3 HAWES, 119.]

COLOR OF TITLE is a writing professing to pass title, but failing to do so because the grantor had none to pass, or the writing is too defective to accomplish its object. It must not be so obviously defective that a person of ordinary comprehension could not be misled by it.

EJECTMENT. The plaintiff claimed under a grant from the state. The defendant claimed title by an adverse possession of

more than twenty-five years, under a sheriff's sale of the said land, and gave in evidence a copy of a record from the county court showing an attachment sued out in January, 1784, at the instance of one James Greenlee against one Richardson, with this return thereon: "Attached one piece of land that Richardson bought of Kennedy." It was further proved that there was a verdict and judgment for the plaintiff in said suit, and a *fi. fa.* issued thereon and returned "satisfied." The defendant then proved by parol that the same tract of land mentioned in the levy of attachment, and now in suit, was sold on said execution, and bought by Greenlee, under whom the defendant claimed. Although it was generally believed at the time of sale that the land had belonged to Kennedy, no grant to him from the state was proved. The principal question was as to whether the attachment, execution and sale constituted "color of title," in the defendant. Verdict and judgment for the plaintiff, from which the defendant appealed, after an unsuccessful motion for a new trial.

HENDERSON, J. Color of title, as applicable to the present subject, is evidently the production of our own country. I will not, therefore, go abroad for an explanation; the name, I presume, was taken from what is called, giving color in pleading, which is never used in this state, and not often, I believe, in England. The word is not to be found in the act of 1715; it is first used in our act of 1791. Giving color in pleading, is giving to your adversary a title which is defective, but not so obviously so, that it would be apparent to one not skilled in the law, it must be such as would perplex a layman; it, therefore, draws the consideration of the question from the jury (the lay gents) to the court, which is the object of the pleading. I think we should go no further than our act of 1715, at most not further than the act of 1791, on the question we are now investigating. The second section of the act of 1715, ratifies and confirms all sales made by creditors, executors or administrators, husbands and their wives, husbands seised in the right of their wives, or by the indorsement of patents, or otherwise, where the possessor shall have been in possession for seven years. The act of 1791, confirming possessions against the state, uses the same phraseology, except that the words other colorable title are substituted for the words "or otherwise," used in the act of 1715.

The words, "or otherwise," and "other colorable title," mean title of like kind. Those mentioned in the act are all

written ones, are all such as, upon their face profess to pass the title; in some of them, conveyance is sufficient to pass the title, but the defect lies in the want of title in the grantor; in the last instance put, the indorsement of a patent, the conveyance is defective. The defect in that case, is not in the want of title in the grantor, but in the defective conveyance which he has used; and if we take the words of the act of 1791, "other colorable title," as an exposition of the words "or otherwise," in the act of 1715, and expound colorable title by what is meant by giving color in pleading, the only case in which I find color of title used anterior to the acts before mentioned; color of title may then be defined to be a writing, upon its face professing to pass title, but which does not do it, either from want of a title in the person making it, or the defective mode of conveyance that is used; and it would seem, under the act of 1791, at least, that it must not be plainly and obviously defective, so much so that no man of ordinary capacity could be misled by it. The color of title set up in this case, not being in writing, for he proves the purchase by parol only, wants one of the essentials before mentioned, and is, therefore, insufficient; if the purchase appeared in the sheriff's return, it would then be necessary to examine whether such a return professed to pass the title. What is said as to what may be the effect of the words, other colorable title, used in the act of 1791, upon the possessions which that confirms, I beg to be considered as a mere *obiter dictum*, for that act cannot affect the construction of the act of 1715, which alone we are now considering.

TAYLOR, Chief Justice, and HALL, Judge, concurred.

COLOR OF TITLE, WHAT IS.—An excellent definition of the term "color of title" is given by Daniel, J., in delivering the opinion of the court in *Wright v. Mattison*, 18 How. U. S. 56, where he says: "We deem it unnecessary to examine in detail the numerous decisions adduced in the argument for the plaintiff in error to define and establish the meaning of the phrase 'color of title.' The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title under which an entry or a claim has been made in good faith." See, also, *Edgerton v. Bird*, 6 Wis. 527, quoting this definition with approval. In *Thompson v. Cragg*, 24 Tex. 596, the court say: "Color of title differs from title only in externals. The substance of both is the same." Rhodes, J., in *Bernal v. Gleim*, 33 Cal. 676, defines it to be "that which the law will consider *prima facie* a good title, but which by reason of some defect not appearing on its face does not amount to title." A definition

very similar to that adopted in the principal case is given by Lumpkin, J., in *Beverly v. Burke*, 9 Ga. 443: "What is meant by color of title? It may be defined to be a writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used, a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law."

A clear explanation of the meaning of this phrase is contained in the opinion of the court in *Brooks v. Bruyn*, 35 Ill. 394, where it is said: "Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance gives color of title to the lands described. Such an instrument purports to be a conveyance of the title, and because it does not, for some reason, have that effect, it passes only color or the semblance of a title. It makes no difference whether the instrument fails to pass an absolute title, because the grantor had none to convey, or had no authority in law or in fact to convey one, or whether such want of authority appears on the face of the instrument or *aliunde*. The instrument fails to pass an absolute title, for the reason that the grantor was not possessed of some one or more of these requisites, and, therefore, it gives the semblance or color only of what its effect would be if they were not wanting." To the same effect see *Dickenson v. Breden*, 30 Ill. 279; *Cook v. Norton*, 43 Id. 321. Mr. Abbott defines the term thus: "That which purports to be, but is not, evidence of ownership of property; an instrument which in form purports to, but in effect does not, pass title." Abb. Law Dict. *sub. voc.* "Color of Title."

NECESSITY OF WRITING.—In many of the definitions of "color of title" it is assumed, and in several it is directly stated that it cannot exist except by virtue of some writing purporting to convey the title. Thus, in *Hamilton v. Wright*, 30 Iowa, 480, a distinction is drawn between "color of title" and "claim of title," the latter being the phrase used in the statutes of that state on the subject of adverse possession, and it is held that while a paper title is necessary to give color, it is not so as to claim of title. And see *Field v. Boynton*, 33 Ga. 242. It seems, however, to be the better doctrine that "color of title" may exist without any instrument purporting to convey title, provided always that there is a *bona fide* claim of the title, and some record or some public and notorious act, such as a survey, in which the precise extent of the claim is defined, and with reference to which the claim is made. This is very distinctly laid down in *McClellan v. Kellogg*, 17 Ill. 501, by Scates, C. J., who says: "Color may be given for title without a deed or writing at all, and commence in trespass; and when founded upon a writing it is not essential that it should show upon its face a *prima facie* title, but that it may be good as a foundation for color, however defective. Without further discussion of that point, I simply refer to some of the many authorities which clearly support that principle: *Laframbois v. Jackson*, 8 Cow. 589; *Smith v. Burtis*, 9 Johns. 180; *Jackson v. Wheat*, 18 Id. 40; *Jackson v. Newton*, Id. 355; *Jackson v. Camp*, 1 Cow. 605; *Hawk v. Senseman*, 6 Serg. & R. 21; *Miller v. Shaw*, 7 Id. 129; *Bell v. Hartly*, 4 Watts & S. 32; *Malson v. Fry*, 1 Watts, 433; *Frederick v. Searle*, 5 Serg. & R. 236; *Boyer v. Benlow*, 10 Id. 303; *Dufour v. Camfranc*, 11 Mart. 715 [13 Am. Dec. 360]; *Whiteside v. Singleton*, Meigs, 207."

This point is discussed at considerable length by Adams, J., in delivering the opinion of the court in *Rannels v. Rannels*, 52 Mo. 112. He says: "A mere trespasser who enters upon land without any pretense of title cannot by any contrivance, such as surveying the land and claiming it to the boundaries of such survey, extend his possession beyond his actual inclosure.

Such a wrong-doer would have no right of action against other trespassers on the same tract outside of his inclosure. To maintain an action against outside trespassers there must be actual possession of a part of the tract, with color of title to the whole. In my judgment, whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrong-doer for a trespass on the remainder of the land, would be a sufficient color of title under the statute of limitations as against the real owner. It is not necessary that this color of title should be created by deed or other instrument of writing. It may be created by an act *in pais* without writing. In *McCall v. Neely*, 3 Watts. 69, Judge Gibson said the words 'color of title' do not necessarily import the accompaniment of the usual documentary evidences, for though one entering by a title depending on a void deed would certainly be in by color of title, it would be strange if another, entering under an erroneous belief that he is the legitimate heir of the person last seized, should be deemed otherwise; and it would be stranger still if his alienee were deemed to have more color of title than he had himself. To give color of title, therefore, would not seem to require the aid of a written conveyance, or recovery by process and judgment, for the latter would require it to be the better title. I would say that an entry is by color of title when it is made under a *bona fide* and not pretended claim of title existing in another.' The supreme court of Indiana in *Bell v. Longworth*, 6 Ind. 273, denied the right of a mere intruder to extend his possession beyond the limits of his actual inclosure; holding, however, that a conveyance was not necessary to give color of title. That court says: 'But when a party is in possession pursuant to a state of facts which of themselves show the character and extent of his entry and claim, the case is entirely different, and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and the extent of the claim, and no colorable title does more.' And the same doctrine was afterwards maintained by that court in *Van Cleave v. Milliken*, 13 Ind. 105. See also *Sumner v. Stevens*, 6 Met. 337; *Ashley v. Ashley*, 4 Gray, 197; *Angell on Lim.* 406.

"In the *City of St. Louis v. Gorman*, 29 Mo. 593, cited and relied on by the learned counsel for appellant, Judge Scott did not mean to be understood that a deed or other written instrument was necessary to create color of title. He was very careful not to convey that idea. His language imports that there may be cases where color of title is conveyed without writing. He sums up in these broad and comprehensive terms: 'When we say a person has color of title, whatever may be the meaning of the phrase, we express the idea, at least, that some act has been previously done, or some event transpired, by which some title, good or bad, to a parcel of land of definite extent, has been conveyed to him.' In the case under review, there was an act performed *in pais*, by which color of title was conveyed by the plaintiff to his sister. He made her a verbal gift of a defined tract of land, had it surveyed for her, and put her into the possession under this survey and the description in his own deed. This was equivalent to livery of seisin at common law, whereby a freehold estate was conveyed without any writing whatever."

But, as already stated, there must be, in the absence of any instrument purporting to convey title, something to define the boundaries of the claim, for the chief use of "color of title," is to give constructive possession, beyond the actual occupancy, to the full extent of the claim: See the note to *Taylor v. Buckner*, 12 Am. Dec. 357. The true position on this subject is thus stated in *Cooper v. Ord*, 60 Mo. 431: "It is true that it does not always

require a written instrument to constitute color of title, but there must be some visible acts, signs or indications, which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title."

VOID INSTRUMENT MAY GIVE COLOR.—It is loosely laid down in some cases that a void deed cannot give color of title. Thus in *Bernal v. Gleim*, 33 Cal. 676, the court say: "An absolute nullity, as a void deed, judgment, etc., will not constitute color of title." It was accordingly there held that a sheriff's deed executed before the expiration of the time allowed to redeem would not give color of title, because the sheriff had then no authority to execute the conveyance. But the decisions already cited abundantly show that the general doctrine is too broadly stated in that case. That a void deed may be good as color of title scarcely admits of a question. This is clearly the doctrine of *Brooks v. Bruyn*, 35 Ill. 394, referred to above. So, also, of *Pillow v. Roberts*, 13 How. U. S. 472, where the court say: "Color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims adversely to all the world." See, also, *Ewing v. Burnett*, 11 Pet. 54. Thus in *Linlsey v. Fry*, 25 Wis. 460, it was held that a tax deed, void on its face, but duly recorded, would operate as color of title. So in *Beverly v. Burke*, 9 Ga. 440, with respect to a sheriff's deed which was in fact void, because the land was out of the sheriff's bailiwick. So, in *Burkhalter v. Edwards*, 16 Ga. 593, it was held that a sheriff's deed, unaccompanied by the execution under which the sale was made, was good as color of title, although the sale might be void. So, a grant from the state which was void for irregularity, but under which the grantee entered *bona fide*, was pronounced sufficient color of title in *Moody v. Fleming*, 4 Ga. 115. So a deed without a seal: *Barger v. Hobbs*, 67 Ill. 592; and this applies to sheriff's deeds: *Kruse v. Wilson*, 79 Id. 233; *Hamilton v. Boggess*, 63 Mo. 233. So a tax deed in which the state is not named as grantor, as required by law: *Edgerton v. Bird*, 6 Wis. 527. So an agreement of partition, where one of the parties is an administrator, and is acting in the premises without an order of court: *McMullen v. Erwin*, 58 Ga. 427. So, under peculiar circumstances, a deed from a husband of a life-tenant executed after his wife's decease: *Forest v. Jackson*, 56 N. H. 357. And an unregistered deed has been held color of title: *Campbell v. McArthur*, 11 Am. Dec. 738, and cases cited in note; *Hardin v. Barrett*, 6 Jones L. 159. So, a deed from one having no title: *Kennebec Purchase v. Laboree*, 11 Am. Dec. 79; *Brooks v. Bruyn*, 18 Ill. 539; *Prettyman v. Wilkey*, 19 Id. 241; *McMullin v. Erwin*, 58 Ga. 427; but as to the rule in Louisiana, see *Pike v. Evans*, 94 U. S. 6. So, a will of one who was only a devisee of a life estate in the premises: *Evans v. Satterfield*, 1 Murph. 413; but not where the will was attested by only one witness, and was never proved as the law required: *Callender v. Sherman*, 5 Ired. 711. And in *Gebhard v. Sattler*, 40 Iowa, 152, it was held that a sale under a deed of trust, without giving sufficient notice, was based on color of title. And a fraudulent deed, if accepted *bona fide*, will constitute color of title: *Gregg v. Sayre*, 8 Pet. 244; *Griffin v. Stamper*, 17 Ga. 108.

THE BONA FIDES OF THE GRANTEE seems to be the real point of inquiry in such cases. If he acts under the instrument in good faith and relies upon it, it will be good as color of title, even though it is void on its face, and generally his *bona fides* will be presumed until the contrary appears: *Brooks v. Bruyn*, 35 Ill. 394; *Hardin v. Gouverneur*, 69 Id. 140; *Russell v. Mandell*, 73 Id. 136; *McMullin v. Erwin*, 58 Ga. 427. But if the grantee is chargeable

with fraud, or knows that the deed conveys no title, it will not avail him as color: *Waterhouse v. Martin*, Peck, 392; *Saxton v. Hunt*, 20 N. J. L. 487; *Moody v. Fleming*, 4 Ga. 115. So, if the instrument itself shows that the grantee does not claim in his own right: *Simmons v. Lane*, 58 Ga. 178. And see, further, as to the necessity of good faith on the part of the grantee: *Wright v. Mattison*, 18 How. U. S. 56. The principal case seems to go upon the ground that defects in the title or conveyance are important, not because they will themselves destroy color, but only as affecting the *bona fides* of the grantee, and that, therefore, color will exist notwithstanding such defects, unless they are so patent that a person of common understanding is bound to take notice of them.

INSTRUMENT MUST PURPORT TO CONVEY.—It is clear that an instrument cannot constitute "color of title," unless it purports or professes to convey the title. Therefore, a mere executory contract or bond to convey will not ordinarily constitute color of title. Such an instrument does not profess to convey title, it only promises to convey: *Dunlap v. Daugherty*, 20 Ill. 404; *Rigor v. Frye*, 62 Id. 507; *Kilburn v. Ritchie*, 2 Cal. 145; *Osterman v. Baldwin*, 6 Wall. 116. But in Texas a bond for title will constitute color of title because such an instrument is regarded and treated there "as a species of title," which may be recorded, and upon which trespass to try title may be maintained: *Miller v. Alexander*, 8 Tex. 36; *Scarborough v. Arrant*, 25 Id. 131; *Elliott v. Mitchell*, 47 Id. 445. And so it is held in Iowa, that where an obligee is in possession under a bond for a deed, he has such color of title that a purchaser from the obligor buys at his peril: *Spiller v. Scofield*, 43 Iowa, 571. On the same ground that to constitute color, the instrument under which the tenant claims must purport a conveyance of the title, it is held that a certificate of purchase at a tax sale is not sufficient for that purpose: *Bride v. Watt*, 23 Ill. 507. So, an execution, levy and sale, unless it is shown that a deed was executed: *Baird v. Evans*, 58 Ga. 350. Boundaries marked on a town map will not constitute color of title where the party in possession does not claim under the map: *City of St. Louis v. Gorman*, 29 Mo. 593.

THE INSTRUMENT MUST DEFINE THE BOUNDARIES of the claim in order to constitute color of title: *Jackson v. Woodruff*, 13 Am. Dec.; Angell on Lim. sec. 408. For it usually gives constructive possession of the entire tract although the grantee actually occupies only a part: See note to *Taylor v. Buckner*, 12 Am. Dec. 357.

NECESSITY OF COLOR TO SUPPORT ADVERSE POSSESSION.—On this point see the note to *Ferguson v. Kennedy*, *post*.

STATE v. SEXTON.

[3 HAWES, 184.]

INDICTMENT—TIME MUST BE STATED.—An indictment must state the day and year on which the offense was committed. If it state an impossible or a future date, this is fatal.

AMENDMENT OF INDICTMENT can not be made without the concurrence of the grand jury by which it was found.

INDICTMENT for assault with intent to kill, charging the offense to have been committed August 19, 1824, the indictment having been found in March, 1824. At the trial the prosecutor moved to amend the indictment as to the alleged day of the commission of the crime, but the motion was overruled. After a verdict against the defendant, the judgment was arrested on account of this defect in the indictment.

By Court. It is a familiar rule that the indictment should state that the defendant committed the offense on a specific day and year, but it is unnecessary to prove, in any case, the precise day or year, except where the time enters into the nature of the offense. But if the indictment lay the offense to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the statutes of jeofails, and cannot, therefore, be amended; being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found. These rules are too plain to require authority, and show that the judgment of the court was right, and must be affirmed.

POWER OF COURT OVER INDICTMENTS. — The general power which courts have over pleadings does not extend to indictments. An indictment proceeds from a grand jury. The court has no creative or amendatory power over it. If it is defective, another grand jury must supply the defects by finding another and more faultless indictment. If a complaint be lost or destroyed the court may supply its place. But if an indictment be lost or destroyed the only remedy of the prosecution is to have the accused reindicted: *Bradshaw's case*, 16 Gratt. 507; *State v. Harrison*, 10 Yerg. 542; *Ganaway v. State*, 22 Ala. 772.

CHAMBERS v. CHAMBERS.

[3 HAWES, 232.]

CO-TENANCY, TAKING OF PROFITS. — If one co-tenant receive the whole profits, the other cannot maintain an action of assumpsit for use and occupation, or money had and received.

ASSUMPSIT for use and occupation, and money had and received. It was agreed that the plaintiffs and the defendant were tenants in common of certain land, of which the defendant took possession and received the whole profits, of which the plaintiffs brought this action to recover their share. The defendant was not tenant to the plaintiffs; there was no lease, and

no express promise of payment by the defendant. The court below held that the action could not be maintained, and directed a nonsuit, and the plaintiff appealed.

TAYLOR, C. J. It has been held that if two were jointly possessed of a horse, and one of them sell him, an action of account will lie against him for his share of the money; and it has been thought that an action on the case of money had and received might also be brought, because by the sale and turning the thing into money, the joint interest was gone, and each had a separate interest for a sum certain: Willes, 209. But when one tenant in common secured the rents and profits of a real estate, the other could not bring an action of account against him at common law, unless the latter were appointed bailiff. This is remedied in England by the statute of Anne, which, however, has not, I believe, been extended by construction to an action on the case. In this state the law remains as it was when Lord Coke wrote "albeit one tenant in common take the whole profits, the other has no remedy by law against him, for the taking of the whole profits is no ejectment:" Co. Lit. 199, b.

HALL, J. I concur in the opinion with the judge below, that the present action cannot be supported. By the common law, joint tenants and tenants in common had no remedy against each other where one alone received the whole profits of the estate, for he could not be charged as bailiff or receiver to his companion: Co. Lit. 172, a; 186, a; 200, b. By the fourth and fifth of Anne, ch. 16, the action of account is given in such cases; but that statute, for that purpose, is not in force here. If it was, it would afford no support to the present action. If there had been an express promise, the case would be different; but the law will not imply one: Bac. Abr. "Assumpsit" A. In case of an ouster by one tenant in common, after judgment for the other in ejectment, trespass would lie for the mesne profits: 3 Wils. 118; but I think there can be no authority found in support of this action. The case is a hard one, but it is not in our power to alter the law. I therefore think judgment must be given for the defendant.

HENDERSON, J., was of the same opinion.

ACTION BY ONE CO-TENANT AGAINST ANOTHER FOR RENTS AND PROFITS.—By the common law, one co-tenant had no remedy against another, who received all the rents and profits of their common property. This rule was founded on the technical ground that no action of account could be maintained unless the co-tenant could be charged as guardian, bailiff, or receiver.

"Therefore, all those bookes which affirm that an action of account lieth by one tenant in common or joint tenant against another, must be intended when one maketh the other his bailife, for otherwise, never his bailife to render an account, is a good plea." Co. Lit. 209 b; Freeman on Co-tenancy and Partition, sec. 269; *Henderson v. Eason*, 17 Ad. & El., N. S., 718; *Wheeler v. Dorne*, Willea, 208. To remedy this defect in the common law, the statute 4 and 5 Anne, ch. 16, was passed. It authorized actions of account to be brought and maintained "by one joint tenant, and tenant in common, his executors and administrators against the other as bailiff, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common." To sustain an action under this statute, the complainant must, by averment and proof, bring himself within its provisions. He must aver that the respective interests of plaintiff and defendants are: *Hayden v. Merrill*, 44 Vt. 341; and that the defendant has received more than his share of the profits: *Early v. Friend*, 16 Gratt. 52; *Hayden v. Merrill*, 44 Vt. 336; *Stupton v. Richardson*, 13 Mees & W. 21; *Irvine v. Hamilton*, 10 S. & R. 221; *Sargent v. Parsons*, 12 Mass. 149; *Barnum v. Landon*, 25 Conn. 148; Freeman on C. & P., secs. 270-272.

Under the statute of Anne, each co-tenant must account for the rents which he has received from any tenant in occupation of the property of the co-tenancy: *Izard v. Bodine*, 3 Stock. 404; *Crow v. Mark*, 52 Ill. 332; *Pope v. Harknis*, 16 Ala. 324; and probably for such profits as may have accrued to him from the use of the rents so received: *Huff v. McDonald*, 22 Ga. 161. But a co-tenant, though in the sole use of the property, is not within the statute of Anne. He does not receive profits, and cannot be compelled to pay rent, nor to account for any portion of what he makes through his exclusive use of the property: *McMahon v. Burchell*, 2 Phill. 134; *Henderson v. Eason*, 17 Ad. & El., N. S., 701, 718; *Sargent v. Parsons*, 12 Mass. 152; *Woolever v. Kapp*, 18 Barb. 265; *Scott v. Guernsey*, 60 Id. 163; *Crane v. Waggoner*, 27 Ind. 52; *Ragan v. McCoy*, 29 Mo. 367; *Izard v. Bodine*, 3 Stock. 404; *Nelson v. Clay's Heirs*, 7 J. J. Marsh. 141; *Pico v. Columbet*, 12 Cal. 419; *Goodenow v. Ewer*, 16 Id. 471; Freeman on C. & P. 274-275. Contra, that a co-tenant must account for profits realized from use of the property: See *Thompson v. Bostwick*, 1 McMullan's Eq. 75; *Holt v. Robertson*, Id. 475; *Volentine v. Johnson*, 1 Hill Ch. 49; *Early v. Friend*, 16 Gratt. 47; *Ruffners v. Lewis's Exrs.*, 7 Leigh. 720; *Graham v. Pierce*, 19 Gratt. 38.

ASSUMPSIT BY ONE CO-TENANT AGAINST ANOTHER to recover his share of the rents and profits received by the latter, has been sustained in several of the states, on the grounds: "1. That, whenever account can be maintained, *indebitatus assumpsit* may also; and, 2. That the statute, being remedial, ought to receive a liberal construction:" Freeman on C. & P. secs. 280-284; *Jones v. Harraden*, 9 Mass. 540; *Brigham v. Eveleth*, 9 Id. 541; *Moses v. Ross*, 41 Me. 360; *Fanning v. Chadwick*, 3 Pick. 420; *Miller v. Miller*, 7 Id. 136; *Munroe v. Luke*, 1 Met. 464; *Shephard v. Richards*, 2 Gray, 424; *Dickinson v. Williams*, 11 Cush. 260; *Buck v. Spofford*, 40 Me. 328; *Gowen v. Shaw*, 40 Id. 58; *Dyer v. Wilbur*, 48 Me. 287; *Ficquit v. Allison*, 12 Mich. 329; *Gillis v. McKinney*, 6 W. & S. 78; *Borrell's adm. v. Borrell*, 33 Pa. St. 494. In other parts of the United States, and in England, assumpsit is not an available remedy to recover from a co-tenant the rents and profits which he has received beyond his proportion: *Thomas v. Thomas*, 5 Exch. 32; *Terrell v. Murray*, 2 Yerg. 384; *Crow v. Mark*, 52 Ill. 332; *Hamilton v. Conine*, 28 Md. 640; *Sherman v. Ballou*, 8 Cow. 310.

THE GOVERNOR v. CARTER.

(3 HAWES, 322.)

THE LEVY UPON REALTY, in preference to personalty, is not a matter for complaint on the part of the plaintiff, if he gets his judgment satisfied.

THE SHERIFF IS NOT LIABLE if the property, when levied on, is sufficient to satisfy the writ, though before the sale it depreciates so as to become insufficient.

SHERIFF'S DUTY—BANK NOTES.—A sheriff is not liable for an insufficient levy, if the property seized was sufficient to pay the debt if sold under execution for current bank notes.

DEBT on a sheriff's bond brought in the name of the governor to the use of Pratt and others. The breach assigned was that the defendant, Carter, had failed to make the amount of a writ of *fi. fa.*, placed in his hands by the plaintiffs against one Jones, to be levied of his "goods, chattels, lands and tenements," although the said Jones had at the time ample property to satisfy it. The plaintiffs proved that the writ was issued November 26, 1818, at which time, and for a long time afterwards, the said Jones had sufficient personal property within the county to satisfy it, which property was subsequently sold on other executions. The defendants proved that the plaintiffs' writ and four others of the same *tenore*, amounting in all to nearly five thousand dollars, were, on January 15, 1819, levied on a house and lots and storehouse, stables and a warehouse, occupied by said Jones; that the plaintiffs' writ was returned on the fourth Monday in February, 1819, indorsed "forborne by the orders of plaintiffs;" that a *renditioni exponas* then issued, returnable in May, 1819, which was returned indorsed "no sale for want of bidders," when Carter retired from office, and that the said Carter's successor, on two writs of *venditioni exponas*, returnable respectively in November, 1819, and February, sold all the property levied on January 15, 1819, for an amount less than plaintiffs' execution, and paid the same to the plaintiffs. The defendants also produced evidence to show that at the time of the levy the property levied on was sufficient to satisfy all the executions if sold at a fair price, but it was uncertain what it would bring in specie; that one Amis deposited a large amount in bank notes to purchase the houses and lots, but afterwards declined bidding because the property was sold for specie by direction of the plaintiffs' agent given to Carter's successor; and that between January and November, 1819, there was a great decline in the value of property in that vicinity. The property was finally sold for bank notes at a discount.

The judge charged the jury that it was the sheriff's duty to levy on personal before real property; that it was for them to ascertain whether, if the sheriff had levied on all the goods in the store, the plaintiffs' debt would have been satisfied, and whether the levy made January 15, 1819, was sufficient to satisfy all the executions; that the plaintiffs had a right to demand specie, nor could the sheriff complain of it, and that, in this case, as the plaintiffs were northern merchants, the sheriff must have known that they were not bound to receive bank notes even if he had sold for them. Verdict for the plaintiffs, and the case was argued in this court on a rule to show cause why a new trial should not be granted.

Gaston, for the rule contended: 1. That the court misdirected the jury in charging them that it was the sheriff's duty to levy on personalty first, since the writ included both realty and personalty; that the statute as to levying first on personalty was directory and was for the benefit of the debtor and did not concern the creditor, and besides that the plaintiffs had sanctioned the levy by accepting the proceeds: *McCoy v. Beard*, 1 Hawks, 377; 2. That the court had not stated certain important qualifications of the rule as to the sheriff's liability in such cases, as that he might levy on land if no chattels were shown to him; that he was bound to levy on no more than was then sufficient; that he was not responsible for depreciation, etc.; 3. That the judge erred in intimating an opinion on the facts: *Reel v. Reel*, 2 Hawks, 86, 87, 88, 92; 4. That the loss, if any, was the result of the plaintiffs' mismanagement in postponing the sale, etc., of which the sheriff's return was evidence.

Ruffin and Hogg, contra, contended: 1. That the sheriff was bound to use due diligence to levy on enough property; 2. That as to the postponement, there was no proof but the return which was not evidence in this case, as this was in effect an action for a false return.

TAYLOR, C. J. Every plaintiff is undoubtedly entitled to demand specie, and is not bound to receive bank bills in payment of his judgment. But the greatest injustice would be done, if in actions against sheriffs for an insufficient levy, the court were not to take notice that the currency of the country is in bank bills, and that where it is not stipulated to the contrary all persons calculate upon paying and receiving such bills. If, therefore, a sheriff makes a levy upon property which would be adequate were it sold for bank notes, but inadequate were it

sold for specie, he cannot in reason be chargeable upon his bond, unless previous notice be given him that specie alone will be receivable. The jury should have been instructed to inquire whether the levy was sufficient, if the property had been sold for bank notes; and if it was, it would, in my opinion, have discharged the sheriff, without previous notice distinctly given that specie alone would be received. Nor is it right that the sheriff should be chargeable with any depreciation occurring to the property during the time that the execution was forborne by the plaintiff; of this fact of forbearance the sheriff's return is *prima facie* evidence; and it should have been taken into consideration by the jury. I think there ought to be a new trial.

HALL, J. The judge in his charge to the jury stated that it was the duty of the sheriff to levy on personal property before real; and it must be taken, I think, that the law was so stated to strengthen the claim of the plaintiff and weaken the ground on which the defendant stood. In a contest between the defendant in the execution and the sheriff, on account of the sheriff having levied on the real instead of on the personal property of the defendant, it would be indispensable so to declare the law to be; but between the plaintiff in the execution and the sheriff, such misconduct of the sheriff cannot be examined; it cannot be the ground of complaint or censure, and to have stated it in the present case may have thrown undue weight in the scale against the defendant.

It was very properly left to the jury to ascertain whether the levy on Jones's property, made on the fifteenth of January, 1819, was sufficient to satisfy the execution then levied. If it was sufficient, I think the defendant ought to be excused, although it afterwards turned out not to be sufficient, on account of its depreciation in value. But the judge again leaves it to the jury to ascertain whether, "if the sheriff had levied on the whole of the goods in the store, the plaintiff's debt, with interest, would have been satisfied or not." This part of the charge seems to interfere with that which directed them to ascertain "whether the property levied on, on the fifteenth of January, 1819, was sufficient to satisfy the execution levied on it;" because, although they found that it was sufficient and the defendant thereby excused, yet, if they again found that in case he had levied on the whole of the goods in the store, the debts with interest might have been satisfied; they must have found a verdict against him on that account, although they had just acquitted him of blame, because the lands and negroes levied upon, on the fifteenth of

January, 1819, were sufficient. I think the rule for a new trial should be made absolute.

HENDERSON, J. The breach assigned is, that the sheriff did not levy on property sufficient to satisfy the plaintiff's execution, he having it fully in his power to do so. The levy was made in January; the sale took place in December following, by another officer, under a *venditioni exponas*, sheriff Carter having gone out of office in May. The sheriff insists that the property levied on was of sufficient value at the time of the levy; but, from decline in price, and other causes not within his control, when sold, in December, the proceeds were insufficient to satisfy the plaintiff's execution. The plaintiff relies upon the proceeds of the sale as the evidence of the value, and also insists upon the specie price as the sole standard. The judge informed the jury "that it was the duty of the sheriff to levy on personal property before he levied on real property, and left it to them to ascertain from the evidence that if the sheriff had levied on the goods in the store, whether the whole debts of the plaintiff in the execution would not have been satisfied; and instructs them to ascertain from the whole evidence whether the property levied on was sufficient on the fifteenth of January, 1819, the time of levy, to satisfy the executions levied; and that it was the right of the plaintiff to demand specie, and it was no fraud in the plaintiff's agent to demand specie, nor could the sheriff complain of it, as every plaintiff had a right to demand it in payment of his execution; and in this case the sheriff must have known the plaintiffs were northern merchants and were not bound to receive bank notes, even if he had sold for them." The above is a quotation from the judge's charge, taken from the transcript. I have taken down the words, for I am not certain that I understand in what manner it was intended to or did bear upon the case. The first position is certainly correct as applying to a defendant in an execution; he, and he only, can complain; so far as it affected the parties in this action it was irrelevant, nor do I see wherefore it it was introduced, unless it was to throw on the defendant the responsibility of a loss upon a deferred sale, no matter from what cause the loss arose; if the property levied on was not quite of sufficient value to satisfy the execution, and if it stood alone, I would understand it without that qualification; but taken in connection with the real object of their inquiry, as pointed out by the charge, it is but a fair construction to add that qualification to it; but, even so explained, it has an improper influence on the case; for, instead of making the difference in the value of the property

(levied on) at the time of such levy, and the amount of the execution, the measure of the damages (this act being considered by the judge as wrongful) be subjected, the sheriff to bear the whole loss arising from the deferred sale, and thus the difference between the actual proceeds of such sale and the amount due on the execution, became the measure of the damages. This is the most harmless way in which I can understand it.

I am also at a loss how to apply to the case the remark as to the right of creditors requiring payments in specie. It points at two parts of the case. From the evidence it is quite clear that it was a question on the trial, who caused the delay in the sale. The defendant contended that the plaintiff did, and introduces the circumstances which took place on the day appointed for the sale on the execution returnable to August, after Carter was out of office. Among other things the defendant proved, that the plaintiff's agent, after being pressed by Jones, the defendant in the execution, more than once for delays, observed that he could not consent to it, but as he should demand specie, he imagined there would be no sale, and insisted that this was evidence from which the jury might infer that the sale was deferred by the act and connivance of the plaintiff's agent, and that he, the sheriff, ought not to be responsible for any loss occasioned by such delay. Now, if the judge pointed that part of his charge to this circumstance, or rather if the jury so understood it, it was an error; for, however lawful it might be for the plaintiff to demand specie, it was relevant for the jury to infer from this act that the plaintiff consented to and connived at a delay; whether it proved it or not, is not for me to say; it was for the jury. But the plaintiff might cause a delay by a lawful as well as by an unlawful act, which the defendant did not controvert at all. All that he required was that the consequences of the plaintiff's act (and whether it was the plaintiff's act, the jury were to judge) should not be thrown upon him. If, therefore, the judge is understood as informing the jury that, as the act was lawful, the consequences of it ought not to be borne by the person who did it, he erred; for one of the best criterions to ascertain whether an act is lawful or unlawful is, whether the actor bears himself all the consequences, or if they fall on another; if on the actor alone, it is almost, I believe I may say invariably, lawful; if on others, and they are injured, it is most usually unlawful. These two points go to the standard by which the damages should be measured.

But this specie payment may point to a more important question. It seems that in ascertaining the value of the property levied on the plaintiff contended that the specie value was the true criterion; and if the judge meant by that what the property would sell for in specie, after reasonable notice of the terms, I am not prepared to say that he was wrong. I am fully confident that he would not be wrong, if he means a sale for current bank notes, with such a discount on them as would reduce them to their specie value. But if he means such a sum as the property would sell for in actual specie, without giving notice a reasonable time beforehand that such would be the terms of the sale, I am fully confident that he is wrong. For such rule would place sheriffs entirely at the mercy of their plaintiffs, and they, to save themselves from ruin, from fines and forfeitures and civil liabilities, would in every case levy on treble the value of the property or more, and in cases where it was not intended to demand specie, when the sheriff might be easily placed on his guard, by only requiring that before he shall be subject to those fines, penalties, forfeitures and liabilities for breach of duty, the law should require what is consonant with the practice and convenience, viz., that notice should be given.

I do not intend to say that bank notes are money, or a tender in payment of debts, but by consent. Nor do I say that a payment in bank notes may be refused without any previous notice to that effect. All that I intend to say is this, that when a sheriff, or other officer, is charged with a breach of duty in office, his considering the current bank notes of the country as money, and acting upon that basis, without notice to the contrary by those concerned, is not a breach of duty. But I do not mean to say that if the sheriff sells for bank notes, without notice to sell for specie, that the creditor is bound to take such notes, or that the sheriff is not liable to be sued for the money, but it cannot be considered as a malfeasance in office, or subject him to any fine or penalty, or any action where the grievance is breach of official duty.

I think that, as it is pretty apparent that the jury was misdirected by the judge, there should be a new trial.

STATE v. SMITH.

[3 HAWES, 378.]

SELLING UNWHOLESOME PROVISIONS is an offense indictable at common law.

INDICTMENT charging the defendant with selling unwholesome provisions as follows: "That Samuel Smith, late of the county of Rockingham, farmer, on etc., at etc., did then and there unlawfully, falsely, maliciously, mischievously and deceitfully, sell and dispose of to one David Campbell and others, certain unwholesome and poisonous beef, and did then and there receive pay for the same to the great injury of the said David Campbell and his family, to the great nuisance of the good citizens," etc. The defendant was convicted and fined; motions for a new trial, and in arrest were overruled, and the defendant appealed.

The attorney-general cited *Respublica v. Teischer*, 1 Dall. 335.

TAYLOR, C. J. The first exception, taken both as a ground for a new trial and in arrest of judgment, that there is no charge of the defendant's being a trader in beef, cannot be sustained; for the fact charged in the indictment and with the circumstances accompanying it, is indictable by whomsoever committed. It is not necessary to state in such indictment that the defendant acted in violation of any duty imposed on him by his peculiar condition; for it is a misdemeanor at common law, knowingly to give any person injurious food to eat, whether the defendant be excited by malice or a desire of gain. The charge in *Treewe's case*, was for wilfully, deceitfully and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man. It was laid as an offense at common law; and an exception was taken in arrest of judgment, that it was not indictable, as it did not appear that what was done, was in breach of any contract with the public, or of any moral or civil duty. The defendant was, in fact, a contractor with the public for supplying the prisoners with provisions, but that was not stated in the indictment, nor was it held necessary to state it; and the conviction was supported upon the broad ground, that the giving of unwholesome victuals, not fit for man to eat, whether from motives of gain, from malice or deceit, was clearly an indictable offense: 2 East, P. C. 821. There are several precedents of indictments for the same offense, variously modified, stated in 2 Chit. Cr. Law, 556, on which convictions have been had, upon undoubted principles of law. It is true that a very

ancient statute was passed further to aggravate the punishment for selling unwholesome provisions, but as I have met with no prosecutions upon it, the common law may be supposed to have been weakened by the legislatures making declarations against offenses which were criminal by the common law, when properly understood. Of this, several remarkable instances are stated in Barrington on the Statutes, 313. It seems upon the whole, that the public health, whether affected through the medium of unwholesome food, or poisoning the atmosphere, or introducing infectious diseases, is anxiously guarded by the common law. There ought to be judgment for the state.

HALL, J. I concur in opinion that the act charged in the indictment is an indictable offense. In 4 Bl. 162, it is said that it is an offense against public health to sell unwholesome provisions. From this it might be inferred that unless the public were concerned in the act it was not a public offense, as in the case of *The King v. Baldock*, for supplying prisoners with unwholesome food, he being a public contractor for that purpose: 2 Chit. Cr. L. 255; and the case of *The King v. Treeve*, who was indicted for the same offense: 2 East C. L. 821. But it is laid down by both these writers that the person charged need not be a public contractor; that it is a misdemeanor at common law to give to any person unwholesome food not fit for man to eat, *lucri causa*, or from malice or deceit, apart from other considerations which entered deeply into the demerits of Baldock and Treeve. See, also, 6 East, 133, 141; 2 East C. L. 823; 2 Ld. Raym. 1179; 3 Id. 487. The offense is one that common prudence cannot guard against, and what is most important, the consequences cannot be calculated. I think judgment should be given for the state.

HENDERSON, J., concurred.

BANK OF UNITED STATES v. LANE.

[3 HAWES, 452.]

NOTICE TO INDORSER may be given by sending it to the post-office where he is most likely to receive it at the earliest moment, instead of to the post-office nearest his residence.

ASSUMPSIT against the defendant as indorser of a promissory note. The sole question was as to whether the plaintiff had used due diligence in giving the defendant notice of non-pay-

ment. It appeared that on the day when payment was demanded and refused, the notary deposited in the post-office a letter directed to the defendant at Ashborough (Randolph court-house) informing him of the default. The defendant was sheriff of the county, and was in the habit of constantly attending the sessions of the superior court which was to convene at Ashborough on the Monday that the mail bearing the letter would arrive there. The defendant resided eighteen miles from Ashborough, near a small post-office at Long's. He did not send there regularly for letters, but his servant occasionally called there on the way to mill, and the postmaster sometimes sent him, as opportunities offered, such letters as arrived there. There was only a weekly mail to that office. The judge instructed the jury that it was the duty of the plaintiffs to use due diligence to ascertain the defendant's residence, and to send the notice to that office where he would be most likely to get the earliest intelligence of the transaction, and that if they believed he would have received the letter sooner at Long's, they should find for him, but if they believed he might have received it earlier, or as early, at Ashborough, they should find for the plaintiffs. Verdict for the plaintiffs; motion for a new trial on the ground of misdirection overruled, and judgment on the verdict, from which the defendant appealed.

TAYLOR, C. J. The circumstance that the defendant was sheriff of the county and in the constant habit of attending the courts the whole term of their sitting, would seem to make it likely that a letter directed to Ashborough would reach him sooner than one directed to Long's. At the former place he was on the spot for a week at a time, and, from his public duties, must unavoidably have been under the necessity of calling at, or sending to, the post-office. At the latter place, his servants only occasionally called as they went to mill, and the postmaster would only send letters to him as opportunity offered. This view of the case derives additional strength from the fact that the superior court began on the Monday following the date of the protest, and that on that day the mail bearing the notice would arrive at Ashborough, where the defendant then was. It would be laying down a rule of very embarrassing, if not impracticable, application in this state to compel indorsers to ascertain the nearest office, however obscure, to the indorsee's abode, while there was a public and known one at the court-house to which his business led him frequently. There are so many of these petty offices scattered through the

state, some of which glimmer for a short period and then go out, that the inquiry into their existence would occasion more delay than sending the notice at once to a well-established post-office in the same county. The rules established on this subject, however just and convenient in commercial cities, can scarcely be usefully applied to the transactions in this state, where the parties reside at points remote from each other. But even when the rule was laid down that the notice must be sent to the post-office nearest to the party, it was for the sake of carrying information to them, and upon the presumption that the nearest post-office would best answer that purpose. This was the general rule, which was afterwards so modified that a notice was held good if sent to an office to which the party usually applied for his letters, although it was a different town from that in which he resided. And after all, the question settles down to the inquiry, not whether the notice was directed to the nearest post-office to the defendant, but to that which was most likely to impart to him the earliest intelligence. Under the circumstances of this case, I think it was, and that the verdict is right.

The rest of the court concurring. Judgment affirmed.

NOTICE, HOW DIRECTED.—That notice to an indorser directed to the office to which he usually resorts for letters, though not in the town where he resides, is sufficient, see: *Reid v. Payne*, 8 Am. Dec. 311. See, also, *Stewart v. Eden*, 2 Id. 222.

WILLIAMS v. HUNTER.

[3 HAWES, 545.]

ATTACHMENT, ACTION FOR UNLAWFULLY SUING OUT, cannot be sustained unless malice and want of probable cause are shown.

CASE for unlawfully suing out an attachment. It appeared that the plaintiff, being indebted to the defendant, and others, told defendant that he was going to Montgomery county to get money to pay his debts, and would return in July, and asked defendant what he proposed to do. The defendant said he would wait as long as any of the creditors. The plaintiff spoke publicly of his going and the purpose of it. He left home the last of March, leaving his family there, and also his brother, to put in a crop. He had appointed the day he left to meet and pay one of his creditors at Morganton, on his way to Montgomery, but instead of doing so turned out of his direct road, two

miles from Morganton, and pursued his journey. The defendant heard of this circumstance soon afterwards, and was also informed by one Higgins that the latter had a conveyance of all the plaintiff's lands, and that some thought the plaintiff would never return. He also heard that the plaintiff had declared he would pay him last, if he did at all. Opinions were divided as to whether the plaintiff would return. The defendant's claim fell due April 10, and he sued out an attachment next day which was levied on a mare, claimed by the plaintiff's brother, but the defendant promised to wait if the debt was secured. The plaintiff returned in June.

The judge charged the jury that the suit by attachment was a particular statutory remedy; that the defendant was bound to know what the statute required, and to keep within its provisions, and failing this, he was liable. Verdict for the plaintiff; new trial refused, and judgment, from which the defendant appealed.

TAYLOR, C. J. I cannot distinguish this case from an action for maliciously holding a party to bail, or suing out a writ when nothing is due; in which case the gist of the action is malice, and the want of a probable cause. For, although the plaintiff in the first action should fail to recover, yet unless it was brought with a view to oppress the defendant, and a knowledge that he had no sufficient cause of action, it will not give the original party a right to sue. The complaint here is, that the plaintiff was not subject to the attachment law, not having recently removed; but there is no pretense that he was not justly indebted to the defendant, and if the latter had reason to apprehend the loss of his debt, and believed that the plaintiff had so removed as to subject his property to attachment, he cannot be made liable in this action. It was for the jury to consider, under all the circumstances of the case, whether the defendant's conduct was influenced by vexatious motives. The plaintiff, instead of meeting a creditor according to appointment, went out of his way to pursue his journey, a circumstance which became known to defendant soon after it occurred. He learned, also, that he had conveyed all his lands to one of his creditors; and that he had determined to pay him last, if he paid him at all. When to this is added the difference of opinion that prevailed in the neighborhood relative to the probability of his return, it might have been thought by the jury that the circumstances were strong enough to overpower the presumption of fairness arising from the plaintiff's assertion as to his

intention, and the apparent publicity of his removal. They were at least worthy of consideration, and whatever just inference arose from them should have determined this controversy. It is not for irregularly suing out an attachment that this action will lie, but for suing it out for the purpose of oppression and wrong. There should be a new trial.

HALL, J. I do not think that this case presents any facts which show that the attachment improperly issued. It appears that the plaintiff was indebted to the defendant; that he said it was the last debt he would discharge, as the defendant had been informed. He was also informed that he had conveyed away all his lands; that he had evaded seeing one of his creditors, and paying the debt he owed him, on the day he was to start to Montgomery, as he had promised to do; that it was doubted by the neighborhood whether he would return; besides, it does not appear that he went to Montgomery, and was there when the attachment issued. From all these circumstances, I cannot see wherein the defendant transcended the limits prescribed by the act which authorizes attachments to issue. That act directs that attachments may issue when the party praying it makes oath that his debtor hath removed, or is removing himself out of the county privately, or so absconds or conceals himself that the ordinary process of law cannot be served on such debtor. From the facts set forth, the defendant might have believed that the plaintiff had absconded, or so concealed himself that the ordinary process of law could not be served upon him; and if he believed it, he was not amenable in the present action, although the facts were otherwise than he believed them to be. It is not only necessary, for instance, in the present case, that the plaintiff should have been residing in the county of Montgomery openly, and not absconding from the process of law, but it is also necessary to prove that the defendant knew it. It must be taken that the party swore to the truth until it is proved that he knew the facts to be different from what he deposed to. I therefore think the rule for a new trial should be made absolute.

HENDERSON, J., concurring.

Judgment reversed.

MALICIOUS PROSECUTION OF CIVIL SUIT.—It has sometimes been said that an action for maliciously prosecuting a civil suit will not lie because it is a matter of right to prosecute such suits, and the abuse of this right is sufficiently guarded against by imposing costs on the party who brings a ground-

less action: *Savile v. Roberts*, 6 Mod. 73 n. S. C.; 3 Salk. 16, 1 Ld. Raym. 374; 1 Hilliard's Law of Torts, 443. It is, however, now well settled that where a civil suit is instituted or prosecuted maliciously or without probable cause, and the defendant's property or person is seized, or there is any special or peculiar grievance suffered by him, he may maintain an action for malicious prosecution: *Potts v. Imlay*, 7 Am. Dec. 603; 1 Hilliard's Law of Torts, 443, 456; Cooley on Torts, 187; see the note to *Frowman v. Smith*, 12 Am. Dec. 268. But, in order to maintain the action, malice and want of probable cause must concur: *Sledge v. McLaven*, 29 Ga. 64; *O'Grady v. Julian*, 34 Ala. 88. Still the action will lie, even where the suit was prosecuted for a debt really due, if there was a malicious abuse of legal remedies to the debtor's damage: *Herman v. Brookerhoff*, 8 Watts, 240. In that case, Gibson, C. J., draws a distinction in this particular between the malicious prosecution of criminal actions and of suits of a civil nature. He says: "Though there is a resemblance betwixt an action for the malicious prosecution of a criminal charge, and an action for a malicious arrest or holding to excessive bail in a suit, the cases are not entirely parallel. In a criminal prosecution, want of probable cause must be combined with malice; but in a civil suit the existence of a cause of action is not a defense to a suit for an excessive use of the process."

There is much difference of opinion as to whether this action will lie for the malicious and causeless prosecution of a civil suit, unless there is some exceptional and peculiar injury to the person or property. There are, however, certain cases in which it is generally conceded that the injured party may have this remedy. These will now be noticed.

MALICIOUS ARREST.—It is well settled that if, in the prosecution of a civil suit, a plaintiff maliciously and without probable cause, seize the body of the defendant, he will be liable to an action for malicious prosecution: *Wengert v. Beashore*, 1 Penn. 232; *Herman v. Brookerhoff*, 8 Watts, 240; *Besson v. Southard*, 10 N. Y. 236; or if the plaintiff maliciously cause the defendant's arrest in such suit, in a court having no jurisdiction: *Goslin v. Wilcock*, 2 Wils. 302. Malice and want of probable cause must, however, be both alleged and proved: *Besson v. Southard*, 10 N. Y. 236. But see the opinion of Gibson, C. J., in *Herman v. Brookerhoff*, 8 Watts, 240, a part of which is above quoted. It is said by Ross, J., in *Wengert v. Beashore*, 1 Penn. 232, that the remedy by action for malicious prosecution for wrongfully arresting or holding a defendant to bail in a civil suit is not to be favored, for the reason stated in some of the early English cases, that the bringing of a civil suit is a matter of right. There is little ground for discountenancing this action in such cases now, since the taking of the defendant's body has ceased to be a usual proceeding in personal suits for gaining jurisdiction, and has become an extraordinary remedy. It is further to be observed, that by the want of probable cause in such a case, under the present common practice is meant, properly, not the want of a cause of action, as indicated in the opinion of Gibson, C. J., in *Herman v. Brookerhoff*, 8 Watts, 240, but the want of cause for the arrest.

WRONGFUL ATTACHMENT.—That an action for malicious prosecution will lie, also, for maliciously and without probable cause, attaching a defendant's goods, is well established: *Bump v. Betts*, 19 Wend. 421; *Donnell v. Jones*, 13 Ala. 490; 17 Id. 689; *McKellar v. Couch*, 34 Id. 336; *Stewart v. Cole*, 46 Id. 646; *Whipple v. Fuller*, 11 Conn. 582; *Weaver v. Page*, 6 Cal. 681; *Tomlinson v. Warner*, 9 Ohio, 103; *Fortman v. Rottier*, 8 Ohio St. 548; *McCullough v. Grishobber*, 4 Watts. & S. 201; *Lawrence v. Hagerman*, 56 Ill. 68; S. C., 9 Am. Rep. 674; *Spauls v. Barrett*, 57 Id. 289; *Nelson v. Danielson*, 82 Id.

545; *Spengler v. Davy*, 15 Grat. 381; *Burkhart v. Jennings*, 2 W. Va. 242; *Walser v. Thies*, 56 Mo. 89; *Holliday v. Sterling*, 62 Id. 321; *Lindsay v. Larned*, 17 Mass. 190; *Fullenwider v. McWilliams*, 7 Bush. 389; 1 Hilliard's Law of Torts, 444; Cooley on Torts, 187 *et seq.* Nor is the right of action lost where the injured party has also a remedy on the attachment bond prescribed by statute: *Drake on Attachments*, sec. 154; *Donnell v. Jones*, 13 Ala. 490; S. C., 17 Id. 689; *Lawrence v. Hagerman*, 56 Ill. 68; S. C., 8 Am. Rep. 674. Here, also, malice and want of probable cause must both be averred and proved in order to support the action. This is the doctrine of the majority of the cases: *Spengler v. Davy*, 15 Grat. 381; *Burkhart v. Jennings*, 2 W. Va. 242, and other decisions above cited. Hence, even if there be no probable cause for the attachment, the action will not lie, unless there was malice: *Lindsay v. Larned*, 17 Mass. 190; *McKellar v. Couch*, 34 Ala. 336. But it was held otherwise in *Kirkham v. Coe*, 1 Jones L. 423. But malice may be inferred by the jury from the want of probable cause, as in other cases of malicious prosecution: See note to *Frowman v. Smith*, 12 Am. Dec. 267. And want of probable cause may exist notwithstanding the fact that the defendant may be actually indebted to the plaintiff in the attachment; for "probable cause" does not relate necessarily to the cause of action. Hence, if an attachment is maliciously sued out, where there is some indebtedness, the action will lie: *Spaids v. Barrett*, 57 Ill. 289; *Tomlinson v. Warner*, 9 Ohio, 103. So, where there is a malicious attachment of property greatly in excess of the amount of the debt: *Savage v. Brewer*, 16 Pick. 453.

MALICIOUSLY SUING OUT AN INJUNCTION, without probable cause, is another ground of an action for malicious prosecution: *Robinson v. Kellum*, 6 Cal. 399; *Cox v. Taylor*, 10 B. Mon. 17. But it was held in *Gorton v. Brown*, 27 Ill. 489, that the action was not maintainable where the party was indemnified by an injunction bond, and that the remedy was on the bond. The better opinion would seem to be, however, in accordance with the doctrine generally held in cases of wrongful attachment, that the remedy on the bond does not exclude the common law right of action for the injury.

OTHER CASES IN WHICH THE ACTION LIES are: for maliciously and without probable cause, instituting proceedings to have one declared a bankrupt. *Brown v. Chapman*, 1 W. Bl. 427; *Chapman v. Pickersgill*, 2 Wils. 145; for suing out a commission of lunacy against one maliciously and without probable cause: *Lockenour v. Sides*, 57 Ind. 360; for beginning proceedings in the general land-office, maliciously and causelessly, to impeach and set aside one's entry on public lands, on the ground of fraud: *Hoyt v. Macon*, 2 Cal. 113.

WHETHER A MERE MALICIOUS SUIT, without probable cause, where there is no seizure of the defendant's body or goods, and no other interference with his control of his property, will be a sufficient ground for an action for malicious prosecution, is a question upon which, as already stated, the authorities are divided. The doctrine laid down in *Potts v. Imlay*, 7 Am. Dec. 903, is that, in order to sustain the action, there must be either a seizure of the person or goods of the injured party, or some other special grievance different from, and superadded to, the ordinary expense of a suit. As a general rule, this is no doubt correct; but the difficulty is in determining precisely in what this "special grievance" must consist. Is it necessary that there should be a resort to some extraordinary remedy or course of proceeding; some direct interference with a party's liberty or with his control of his property? In *Mayer v. Walter*, 64 Pa. St. 283, it is held that this is necessary, and that a

mere suit, however malicious, causeless, or injurious, will not be a ground of action, because the recovery of costs is sufficient, both as a remedy and as a penalty. On the other hand, the right of action has been maintained in a number of cases where the wrong consisted in the bringing of a malicious and causeless suit, by which the party suffered some damage additional to the ordinary expense of litigation, although there was no arrest, attachment, injunction or other interference with person or property. Thus, in *Marbourn v. Smith*, 11 Kan. 554, an action for the malicious prosecution of a suit for slander was sustained. So it is laid down in general terms in *Whipple v. Fuller*, 11 Conn. 582; *Closson v. Staples*, 42 Vt. 209; S. C. 1 Am. Rep. 316; and *Woods v. Fennell*, 13 Bush. 628, that the action will lie, where there is no arrest, holding to bail, or attachment: See, also, *Burnap v. Albert*, Taney, 244. The rule is thus broadly stated by Savage, C. J., in *Bump v. Betts*, 19 Wend. 421: "The action lies against any person who maliciously and without probable cause, prosecutes another whereby the party prosecuted sustains an injury either in person, property, or reputation."

An interesting case on this point is a recent Kentucky decision: *Woods v. Fennell*, 13 Bush. 628. The charge there was that the defendant being a citizen of Kentucky, as was also the plaintiff, removed temporarily to Indiana, and maliciously and without probable cause, instituted a suit in the United States circuit court against the plaintiff for breaking into his, the defendant's, house in the night-time and assaulting, beating and wounding him, whereby the plaintiff was put to great and extraordinary expense in being compelled to travel and take his witnesses to another state at a distance from his home to attend the trial. On demurrer the court held the action maintainable, and Pryor, J., delivering the opinion, thus discussed the subject: "The elementary books, in treating of the action for malicious prosecution, lay down the rule that there are three descriptions of damages, either of which is sufficient to support that action, and some one of them must appear or the action will fail: 1. To the person, by imprisonment; 2. To the reputation, by scandal; 3. To the property, by expense: 2 Cooley's Blackstone, and notes, 126; Selwyn's N. P. This rule was evidently established after the enactment of the statute of Marlbridge, giving to the defendant his costs in the event the plaintiff was nonsuited or failed to recover; for at common law, prior to that enactment, such actions could be maintained whether the property of the defendant was seized or not, or whether he had incurred expense in defending it; and regarding then, as now, the bringing of a civil action to be a matter of right, the plaintiff was liable in damages for the malicious institution and prosecution of such an action without probable cause. After the statute giving costs to the defendant, it was held by the common law courts that no action could be maintained on account of the institution and prosecution of a civil action without probable cause, and, therefore, no action could lie for a vexatious ejectment. In all such cases the plaintiff must have gone beyond the proper remedy for the enforcement of his claim, such as procuring an illegal order of arrest, or requiring excessive bail before the action could be maintained. This entire doctrine is based on the idea that the plaintiff bringing the action is sufficiently punished, and the defendant fully recompensed by the statute requiring the plaintiff to pay all the costs. We perceive no good reason for following this rule, and deny to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to the payment of costs *per falsum clamorem*, is no recompense to the defendant when the latter has, by reason of the malicious proceeding on the part of the plaintiff, sustained damages. In cases where the plaintiff has mistaken

his action, or been nonsuited; or where, by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained; but where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery, for the expenses incurred and damages sustained, should be as fully recognized as if his property had been attached, or his body taken charge of by the sheriff."

A contrary doctrine to this is maintained in a late case in Maryland: *McNamee v. Minke*, 9 Cent. L. J. 42 (from advance sheets of the Maryland reports). It is there held in a learned opinion by Alvey, J., that an action for malicious prosecution lies only where there is peculiar injury; such as malicious and groundless arrest, or seizure of property, or putting in bankruptcy, or the like, and that it is not sufficient to aver a prosecution of a civil action maliciously and without cause by which the plaintiff was put to great charge, etc., but that special grievance must be alleged and proved. It is proper to observe that the bringing of such actions in cases where there has been no resort to extraordinary remedies or proceedings, such as arrest, attachment, etc., is not to be favored. There should at least, as was held in *Potts v. Imlay*, 7 Am. Dec. 603, be something special and peculiar in the injury complained of; otherwise every suit in which the plaintiff fails might be made the prolific source of actions and counter-actions for malicious prosecution. The danger of such a practice is very clearly pointed out by Sharwood, J., in *Mayer v. Walter*, 64 Pa. St. 283. See, also, Cooley on Torts, 189, and *McNamee v. Minke*, 9 Cent. L. J., 42.

For a discussion of other questions connected with the subject of malicious prosecution, see the note to *Frowman v. Smith*, 12 Am. Dec. 265.

LINDSAY v. ARMFIELD.

[3 HAWES, 548.]

LACHES OF SHERIFF.—The duty of sheriffs is to execute all process with the utmost expedition, or as soon as the nature of the case will admit; and they are liable for all damage occasioned by their failure to proceed with proper alacrity.

ACTION against a sheriff: 1. For a false return of a writ of *fi. fa.* issued at the plaintiff's instance against one Brown; and, 2. For negligence in failing to make a levy within a reasonable time. It appeared that said writ was *tested* the third Monday in August, 1820, issued September 25, and returned by the defendant indorsed: "Came to hand October 7, 1820; no property to be found." It was further proved that on the first Monday in November; while the writ was in the defendant's hands, he or his deputy went to Brown's house to make a levy, and found fifty or sixty barrels of corn in a barn, but made no levy thereon. The defendant proved that on October 31, 1820, one Carman, a constable, levied on said corn under several executions against the said Brown, issued on judgments recovered October 30, 1819,

said executions being respectively indorsed "aliased and renewed," some on the thirtieth, and the others on the thirty-first of October, 1820, said indorsements being signed by the justice; that Carman did not remove any of the property, or put it in any one's care, and he advertised and sold the same ten days afterwards.

The judge instructed the jury that the executions in Carman's hands were valid, and authorized him to levy; that if he levied his executions before the defendant or his deputy went to levy, the latter, although his execution was of a prior *teste*, could not levy on the same property; and that although the constable left the property in the debtor's hands, no other officer could levy on it if there was no delay in the sale. He refused to charge, as requested by the plaintiff, that the sheriff was bound to use due diligence in making the money on the plaintiff's writ, and that if he did not he was liable, leaving the question of due diligence to the jury; but instructed the jury that the sheriff had until the return of the writ to make the money, unless hastened by the plaintiff, but that if requested by the plaintiff he was bound to levy immediately, unless employed in prior official duties; but that in this case the defendant was not hastened by the plaintiff, and the question of due diligence was submitted to the jury. Verdict and judgment for the defendant, a new trial having been refused, and the plaintiff appealed.

W. H. Haywood, jun., for the appellant, contended: 1. That the court erred in charging the jury that the papers in Carman's hands were valid executions, as the justice had no power to revive them by the memoranda indorsed on the writs, but could only issue an alias or new writ, and that therefore the defendant should have disregarded the levy under those writs; 2. That if the constable's levy was valid, the defendant having a writ of prior *teste*, and finding the property in the debtor's hands before sale, should have levied upon it anyhow, citing *Green v. Johnson*, 2 Hawks, 309 [11 Am. Dec. 763].

HALL, J. The plaintiff's execution was a lien upon Brown's property, and when, on the seventh of October, it came into the defendant's hands, there were not, until the last of that month, any other conflicting executions. No reason is assigned why that execution was not levied upon Brown's property during that time. The law declares it to be the duty of the sheriff to execute all process which comes into his hands with the utmost expedition, or as soon after it comes into his hands as the

nature of the case will admit: *Bac. Abr.*, Sheriff N. Dall., Sh. 109. But it is further stated on behalf of the defendant, that although executions come into the hands of Carman, on the last of October, that those executions were levied upon Brown's property, but that he did not remove any part of it, or place it in the care of any person, that he advertised, and sold it ten days afterwards; that during that time, on the fourth day of November, the defendant went to Brown's house, where the property was on which the constable had levied, and that he failed at the time to levy upon it. In this, I think, he was again guilty of neglect, for I cannot hesitate in believing that the property was subject to the plaintiff's execution, for it had the first lien upon it, which could not be divested by a mere levy of the constable, so that the defendant had between thirty and forty days from the time the execution first came to his hands, to execute it. I give no opinion in a case where an execution issues to a sheriff, and is a lien on property, and a constable under an execution of junior date seizes and sells the property, before the sheriff had it in his power to levy upon it and seize it. I think, in this case, the defendant made a false return, and that he was also guilty of neglect in not satisfying the plaintiff's execution out of Brown's property.

HENDERSON, J. In this case I wish not to express an opinion upon the priority or preferable right to satisfaction of the execution; but if a posterior execution could, by being levied by another officer, as by a constable, or the United States' marshal, gain a preference over one in the sheriff's hands, I think that the possibility of such preference being gained should quicken the exertions of the sheriff, even beyond what the common law required; for by that law there was no such danger, there being but one person in the county (the sheriff) to execute process; and where there are two persons in one county exercising the office of sheriff, as in Middlesex, they both form but one officer, the act of the one is the act of both, and both must be sued. And the law guards the right of the plaintiff against voluntary alienations of the debtor. The sheriff should therefore proceed with all convenient speed to levy the execution in his possession.

His omitting to do so from the seventh of October to the first of November, and more particularly on one so shortly after returnable, to wit, on the third Monday of November, was a neglect which rendered him liable; and this would be neglect, I think, independent of the possibility of the property being taken by posterior executions, and if no such risk existed, that

is, that posterior executions could not gain the preference, then this return of *nulla bona* was false, for there was property in the defendant's possession, and liable to the defendant's execution when the sheriff went to the house of the defendant. As to the plaintiff's hastening the sheriff by a request to proceed immediately, he seeks not to recover for want of extraordinary exertions; but for the want of those exertions which the nature of his office required, by barely having the execution put into his hands. If the plaintiff had sought to have recovered for any loss sustained by want of extraordinary exertions, which the peculiar circumstances of the case might have required, then those circumstances might have been communicated to the sheriff, with a request to proceed immediately in the execution of the process. So that, take it either way, that the constable's executions had gained the preference, or that they had not, I think the sheriff was guilty of neglect, and is therefore liable. This opinion is founded on the facts declared in the record. It is not intended to preclude the sheriff from showing facts or circumstances why he did not go sooner to the debtor's house, or any other fact amounting to a justification. I simply mean to say that omitting from the seventh of October to the first of November to make an attempt to levy an execution, returnable on the third Monday of November, unaccounted for, is in law neglect, and that the person who has sustained a damage thereby may recover. I therefore concur in the opinion of my brother Hall, that a new trial should be granted. The chief justice concurring also; by the court.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

LEWIS v. CULBERTSON.

[11 *SERGEANT & RAWLE*, 48.]

INDEBITATUS ASSUMPSIT.—An action of *indebitatus assumpsit* cannot be sustained by giving evidence of the sale of a growing crop.

NOTICE OF SET-OFF need not be as precise and formal as a declaration, but it must describe with reasonable certainty the demand sought to be set-off.

SET-OFF IN FAVOR OF SURVIVING PARTNER.—In an action against a surviving partner upon a partnership debt, he may set off a debt due him individually from plaintiff.

ERROR to the common pleas to reverse a judgment obtained by the defendant in error in an action of *indebitatus assumpsit* brought by him for goods sold and delivered, to which non-assumpsit and payment were pleaded. At the trial below the plaintiff proved a sale of certain goods by his intestate, Isaac W. Vanlear, to the firm of Lewis & Long, the defendant being executrix of Lewis, the surviving partner. He then offered to prove a sale of certain growing grain, to which the defendant objected; but the court overruled the objection, and exceptions were duly taken and sealed. The defendant gave in evidence a notice served on the plaintiff's counsel, of certain matters of account due to Lewis from Vanlear, intended to be offered as a set-off. To support the account, the defendant also offered an agreement, signed December 13, 1813, between Lewis and Vanlear, to show the amount of wages agreed to be paid to Lewis; but the court, on objection, rejected the evidence, because the notice was not sufficiently certain, and the attempted set-off was not a debt due to the firm of Lewis & Long; to which opinion also exceptions were taken and sealed.

Edwards and Condry, for the plaintiff in error.

Tilghman, for the defendant in error.

By Court, DUNCAN, J. The first exception in the natural order to the proceedings in this cause is the admission of evidence of the sale of a growing crop, on account of an *indebitatus assumpsit* for goods, wares and merchandise, sold and delivered. It was said by Lord Holt to be the act of a very bold man who first declared in *indebitatus assumpsit* generally for goods, etc., sold and delivered. This action had many difficulties to encounter in its infancy. At first it was held not to lie against an executor; at length this was got over, for this extraordinary reason, that as there were assets sufficient, the testator's soul should not be put in jeopardy by the prejudice the defendant's promise had done the plaintiff: 4 Reeve's English Law, 380. It is, however, well settled that in this action it is not necessary to state the particular goods sold and delivered. Indeed, it would swell the record to an enormous size, specially to state the items of an account from an anchor to a needle. The great reason why the plaintiff is bound to show in what respect the defendant is indebted is, that it may appear that it was not a debt of record, or on a specialty: 1 Chit. Pl. 336. Any general words by which that may be made to appear are sufficient: *Peters v. Opie*, 2 Saund. 350, note 2. The course of pleadings is the best evidence of the law. Now, in cases of the sale of real property, the price of a freehold or a leasehold estate, it is necessary to state the contract specially, and on the sale of a growing crop it is always so stated: 1 Chit. 38; 2 Id. 17. So it has been held that *indebitatus assumpsit* generally for goods sold and delivered will not lie for the fixtures of a house. And though crops growing, artificial crops, as to some purposes, are goods and chattels, personal assets for the payment of debts, subject to a levy as personal property on an execution, by our practice, and rendered by act of assembly liable for distress for rent; and though annexed to or growing upon the freehold for certain purposes they may be regarded as chattels, if treated for in respect to their separation, yet this does not hold in all respects. They are not the subjects of felony. At the time the sale was made, the growing crop did not exist in the state of goods, wares, or merchandise, nor as goods, etc., was it capable of delivery. The contract was in its nature special and executory. To give in evidence, on a count for goods sold and delivered, the sale of a tract of land would appear to every man as a

strange incongruity. In *Weigley's Administrators v. Weir*, 7 Serg. & R. 311, there is a very plain intimation that a special *indebitatus assumpsit* for lands sold would not lie, but the contract ought to be strictly laid. The object of the declaration is to give notice. It could not convey any notice to the defendant that on a count for goods sold and delivered, the plaintiff intended to recover as for lands, or a growing crop, or the fixtures of the freehold. In the case of lands the declaration would be bad on the sale of anything savoring of the realty of growing crop annexed to and inseparable from the sod itself. It appears to me on principle and precedent that the contract should be specially laid, and that there can be no recovery in *indebitatus assumpsit* for goods sold, by proving the sale of a growing crop. The entry in a shop-book would not be evidence to charge the defendant.

The second objection is the overruling of the set-off. The notice of set-off need not be so certain, and by no means so formal as a declaration. It must describe the demand with reasonable certainty, so as not to take the plaintiff by surprise: *Gabel v. Jacobs*, 5 T. R. 121. The generality here would be sufficiently certain statement; the plaintiff could not be misled. The latter article bears date before action brought. We must suppose that the preceding ones did also. If they were not due before action brought, they could not be set off. The defendant below offered proof that they were, and that they were articles furnished the plaintiff by the defendant. The set-off of a defendant is in the nature of an action by him. It is certain that S. Lewis could have brought an action against Vanlear for the sum he intended to set off. It is equally true, that in this action Samuel Lewis alone is answerable; the writ, declaration, judgment and execution, must all be against him. By the death of his partner, the *onus* of paying this debt was thrown on him; why then is he not to be permitted to set it off? He is sued by the plaintiff for a debt due him, why should he not set off a debt due to himself? It seems to me to fall within the strict letter of the act. They are mutual debts. In this action the plaintiff could only recover the sum due to him; he could recover it from the defendant only; he had no occasion to bring it against him as surviving partner. For if there be two partners, and one of them buys goods for both, and the other dies, the survivor may be sued generally in *indebitatus assumpsit*, without taking notice of the partnership, and that the other is dead and he survived: *Hagate v. Hare*, Comb. 383. Therefore,

if any debt is due to the same partner, he may set it off: *Smith v. Barrow*, 2 T. R. 478. Under a declaration containing only one set of counts charging the defendant in his own right, the plaintiff may recover one demand from the defendant individually, and another due from him as surviving partner: *Richards v. Heathe*, 1 Serg. & R. 29; *Slipper v. Stidstone*, 5 T. R. 493. It was there held that a debt due to a defendant as a surviving partner may be set off against a demand in his own right. So in *French v. Andrade*, 6 T. R. 582. A set-off is an equitable defense. Why should the assignees or trustees of Vanlear recover against Samuel Lewis, when he is the debtor of Samuel Lewis, and then leave to Lewis a mock action against Vanlear, an insolvent debtor, against whom he might recover a verdict, but from whom he could not obtain one cent? The defendant, who is sued, is the same individual who sets up the counter demand against the plaintiff; he sets it up in his right, because he is sued in his own right. The debts are, in the strictest sense of the word, mutual. There is no occasion to call for the exercise of any equity of power. It was a legal defalcation, and ought to have been read in evidence. It is proper to observe that the substituting of representatives under the act of assembly, does not change their rights; they are the same as if they were original parties to the suit.

Judgment reversed, and a *venire facias de novo* awarded.

WALKER v. U. S. INSURANCE CO.

[11 SENECA AND BAWLE, 61.]

GENERAL AVERAGE.—The doctrine of general average is not applicable to any accidental loss, but applies only when certain property is deliberately sacrificed to the attainment of some object.

ACTION on a policy of insurance on the schooner *Prudence*, claiming for a total loss. The evidence contained in a protest, made by the captain and his officers at Gibraltar, and in the captain's deposition taken at Philadelphia, was to the effect that on December 28, 1812, while the schooner was at Gibraltar, waiting for favorable weather to proceed on her voyage, a storm came on. The next morning, the storm having increased, and the sea making a breach over the vessel, fore and aft, she began to start and was going stern foremost on a reef of rocks. The captain and mate consulted together, and determined that, as they were going ashore, then it was best to cut the cables, and

do what they afterwards did, to try in the first place to go to sea, and if they could not, to go ashore elsewhere, as they might lose their lives where they were then going. The jib was then hoisted to make the vessel pay round, but the sheets parted, and they were obliged to haul the sail down, and the ship became ungovernable. The helm was then put hard up and both cables were cut, as the protest stated, in order to get the ship into the best place for the preservation of their lives, and the vessel and cargo. The ship went broadside for some distance, and then went ashore head foremost, more than a quarter of a mile from the place where she was going stern foremost. She became fastened on the rocks at eleven o'clock; at twelve, she labored much and bilged, and everything was afloat. The next day the masts were cut away, to prevent their working through the bottom. On the thirtieth, lighters were set to work to save as much as possible. The captain stated, that when the jib was hoisted, it was his intention to endeavor to get out to sea, which he probably would have effected if the sheets had not parted. Verdict for the plaintiff, subject to the opinion of the court, as to whether he was entitled to recover for a total loss.

J. Sergeant, for the plaintiff.

Binney and Rawle, contra.

By Court, GIBSON, J. Leaving the authority of *Sims v. Gurney and Smith* untouched, it is sufficient to say that case does not go as far as the case at bar. I cannot discover in the facts submitted by the jury any settled determination to run the vessel ashore at all. The protest of the master and his officers at Gibraltar, and the deposition of the master here, comprise all the evidence in the cause, and in the protest it is said that when the schooner began to start from her moorings, the jib was hoisted to make her pay round, which was found to be impracticable, as the jib-sheets instantly parted and the sail was hauled down. The cables were at the same time cut, and the helm was put hard up, "in order," as it is expressed, "to get into the best place for the preservation of their lives, vessel and cargo." What that best place was, whether a particular part of the shore, or the open sea, is not stated. In the deposition, the master swears in his direct examination "that his intention was to get out to sea, which he probably would have effected if the sheets had not parted." This undoubtedly gives a claim to general average for the loss of the cables and anchors, but

for nothing else, as nothing else was deliberately sacrificed to the attainment of the object; for an accidental loss which happens in an endeavor to bring about a very different event, is not a subject of compensation; and such, according to this part of the evidence, would be the casualty of stranding in an endeavor to get out to sea. It is true, however, that it came out in the cross-examination, that in a consultation between the master and his officers before any act was done, it was said "they were going ashore then, and therefore it was best to cut the cables, and do what they afterwards did, to try in the first place to go to sea, and if they could not do that to go ashore elsewhere, as they might lose their lives where they were going." But even this will not make out the plaintiff's case. If there were, in fact, an intention to run the vessel ashore, there was no act done in pursuance of it, for the vessel became ungovernable the instant the cables were cut, and was driven on the rocks exclusively by the agency of the wind and the waves. All the acts were done in furtherance of the intention to get out to sea; for it was only when that should be found to be impracticable that the subordinate intention of running ashore was to be put in execution. It never was put in execution; and a mere intention to sacrifice a part for the good of the whole, without an act to be done in pursuance of it, is insufficient; it is necessary that the loss arises from the direct agency of some one acting for the general benefit. But if the acts done are not particularly referable to either intention, the consequence is they were done in pursuance of no settled intention; and it is not enough that there be a deliberate intent to do an act that may or may not lead to a loss; there must be a deliberate purpose to sacrifice the thing at all events, or at the very least, to put it in a situation in which the danger of eventual destruction could be increased; and it is this deliberate purpose, combined with a view to the general warfare which is the distinguishing feature between general and particular average. But how can it be said that the vessel was devoted to destruction by the master and crew, when at the period material to the question, every arm was nerved and every yard braced, to escape from the very destruction which ensued? I readily concede, that the chances between getting out of the harbor and going ashore, were equal or nearly so, although the master thinks they were in favor of the first, and that the catastrophe was occasioned by the accidental parting of the jib-sheets; nor do I esteem it of any importance that the master

and crew thought their situation would in any event be bettered by the measures afterwards taken; both are equally remote from a deliberate intention to sacrifice the ship, or to increase the risk of it; and without that there can be no claim to general average. I am, therefore, of the opinion that the plaintiff is entitled to judgment as for a total loss, leaving to the defendant the right to pursue, against the cargo or those who are responsible in respect of it, for contribution for the loss of the cables and anchors, and of the masts, which were cut away while the vessel was on the rocks; as well as for any other sacrifice of the rigging or hull, which can be shown to have been made for the common benefit.

Judgment for plaintiff.

GENERAL AVERAGE—VOLUNTARY SACRIFICE NECESSARY.—It is a settled rule of the law of general average, as laid down in the principal case, that there must be a voluntary sacrifice or loss of some portion of the associated interests for the common benefit, in order that the doctrine may be applied. Where an accidental loss occurs in the course of an endeavor to save ship and cargo, it is the misfortune of the party whose property suffers by it, and he cannot, in equity ask his fellow-adventurers to share it: *Abbott's Law Dict. sub. voc. "Average;" Burrill's Law Dict.: Id.; Bouvier's Law Dict. Id. 1 Parsons on Shipping and Adm. 346; Phil. on Ins., sec. 1271; Flander's Maritime Law, sec. 303; Arnould on Ins. 881; Desty's Shipping and Adm. sec. 291; Hopkins on Average and Arbitration, 11; 3 Kent Com. 232; Sims v. Gurney, 4 Binn. 524; Gray v. Waln, 7 Am. Dec. 642; Peters v. Warren Ins. Co., 1 Story, 468; Crockett v. Dodge, 12 Me. 190; Patten v. Darling, 1 Cliff. 262; Williams v. Suffolk Ins. Co., 3 Sumn. 513; Ross v. Ship Active, 2 Wash. C. C. 241; Caze v. Reilly, 3 Id. 303; Lyon v. Alvord, 18 Conn. 66; Scudder v. Bradford, 14 Pick. 13; Reynolds v. Ocean Ins. Co., 22 Id. 191; Nickerson v. Tyson, 8 Mass. 467; Delano v. The Cargo of the Gallatin, 1 Woods, 642; Lee v. Grinnell, 5 Duer, 400; Meech v. Robinson, 4 Whart. 360; Rathbones v. Fowler, 6 Blatchf. 294; affirmed in 12 Wall. 102; Barnard v. Adams, 10 How. U. S. 270; Star of Hope, 9 Wall. 203. The rule on this subject is very clearly laid down by Clifford, J., in delivering the opinion of the court in the case last cited, where he says: "The authorities, everywhere, agree that three things must concur in order to constitute a valid claim for general average contribution: 1. There must be a common danger to which the ship, cargo, and crew were all exposed, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interests to save the remainder; 2. There must be the voluntary sacrifice of a part for the benefit of the whole, as for example, a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests; 3. The attempt so made to avoid the common peril to which all those interests were exposed, must be to some practical extent successful, for if nothing is saved there cannot be any such contribution in any case." It was there held, however, that the sacrifice would be regarded as voluntary if the will of the master contributed in any degree to the loss, as where in his efforts to beach his ship for the pur-*

pose of saving the cargo, she struck on a rock of whose existence he had no knowledge.

An excellent illustration of the doctrine that only voluntary and not accidental loss is the subject of general average, is found in *Rathbones v. Fowler* 6 Blatchf. 294, and affirmed by the supreme court of the United States, on appeal, in *Fowler v. Rathbones*, 12 Wall. 102. The case was, that the bow of a ship having been much cut by ice, and there being imminent danger of the loss of the vessel and cargo, the master, for the purpose of saving as much as possible, ran her ashore, and the cargo, though much wetted in consequence, was saved, and it was held that the doctrine of general average should be applied. A part of the cargo, however, was composed of linseed which had been previously wet by water running through the holes cut by the ice, and it was held that this damage was not the subject of general average, not having been in any degree voluntarily incurred. On similar grounds it has been held that where the loss is inevitable, it cannot be turned into a voluntary sacrifice so as to be made the subject of general average. Thus, where part of a cargo was lime which ignited by becoming wet, and was thrown overboard to save the ship and the rest of the cargo, it was held that, as the lime must have been destroyed by fire if it had not been thrown overboard, it had ceased to possess value and could not be made a voluntary sacrifice and, therefore, there was no case for general average: *Crockett v. Dodge*, 12 Ma. 190. No where a vessel was purposely run on shore after it was discovered that she would inevitably go ashore anyhow: *Meech v. Robinson*, 4 Whart. 360, citing the principal case as substantially overruling: *Sims v. Gurney*, 4 Binn. 524.

It is undoubtedly the settled doctrine in the United States that where a vessel is voluntarily stranded for the purpose of saving the cargo, and the cargo is thereby saved, although the ship is wholly lost, it is a case for general average: *Gray v. Wain*, 7 Am. Dec. 642, and note: *Patten v. Darling*, 1 Cliff. 154; *Mutual Safety Ins. Co. v. Cargo of Brig George*, Olcott, 89; *Sturgess v. Cary*, 2 Curt. 59; *Star of Hope*, 9 Wall. 203; *Fowler v. Rathbones*, 12 Id. 102; *Bales of Cotton*, 8 Blatchf. 221; *Fitzpatrick v. Eight Hundred Bales of Cotton*, 3 Bened. 42.

COMMONWEALTH v. MURRAY.

[11 BERGANT & RAWLE, 73.]

QUO WARRANTO, OBJECT OF.—The object of the writ of *quo warranto* was to remove or terminate some usurpation of the rights or prerogatives of the crown.

QUO WARRANTO AGAINST A MINISTER cannot be sustained where there is no established church and each religious society manages its own concerns. He does not hold an office connected with the administration of justice, nor does he exercise a right or franchise belonging to the commonwealth.

QUO WARRANTO. The case is sufficiently stated in the opinion. *Milnor and Rawle*, for the writ.

C. J. Ingersoll, contra.

By Court, TILGHMAN, C. J. A rule having been laid on the

defendant to show cause why an information in the nature of a *quo warranto* should not be filed against him to show by what authority he exercises the functions of "minister in charge of Wesley church." It is objected by his counsel that the religious office which he exercises is not the subject of a *quo warranto*.

The statute of 9 Ann. Ch. 20 not having been extended to this commonwealth, all our proceedings in nature of *quo warranto* are at common law. The ancient writ of *quo warranto* having been found inconvenient has been long discontinued, and the information in nature of *quo warranto* adopted in lieu of it. But informations are not granted except in cases where the writ itself would have lain. We must inquire, therefore, what those cases are. The object of the writ of *quo warranto* seems to have been to remove some usurpation of the rights or prerogatives of the crown. It is defined by Blackstone (3 Com. 262) to be "in nature of a writ of right for the king against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right." Now, of what nature is the office held by the defendant? It appears by the affidavits laid before us that he acts as a minister or pastor of the Wesley church; an office to which no salary is attached, although he has received a small sum from several members of the congregation as a charitable donation in consideration of his age and infirmity. It is difficult to conceive how he has usurped any right or prerogative of this commonwealth. We have no established church. Every religious society is left to the management of its own concerns. They elect their ministers as they please. The government has nothing to do with it. It appears that the legal title of the Wesley church is vested in trustees, and that the congregation is divided into two parties. Those by whom the defendant is supported have lately obtained a charter of incorporation under which the defendant was elected minister. But their opponents, at whose instance the rule to show cause, etc., was laid, disdained the charter and stand upon the voluntary association by which the whole congregation was united before the church was built. And they have elected another minister, of the name of Johnson. Each party asserts itself to be a majority of the whole congregation. Those who move for the information say that they have no other remedy. But that is not the case. An ejectment may be brought for the church, in the name of the trustees, and then it may be tried which party is entitled to the

possession. Indeed, it is in proof that an indictment for a forcible entry and detainer is now pending. The office of minister of a church is no way connected with the administration of justice. Neither is it a right or franchise which belongs to the commonwealth. An information has been granted against one who exercised the office of a constable: *Rex v. Goudge*, 2 Str. 1213. So against one who exercised the office of bailiff of an ancient ville: *Rex v. Boyles*, 2 Id. 836. So against one who exercised the office of a trustee for the superintendence of a public port under a statute: 1 Id. 299. In the first two of these cases, the administration of justice was concerned; in the last, the king's prerogative. An information lies against one who claims an exclusive right of ferry over a public river. There, again, prerogative comes in question, and, besides, the public is much interested. But an information has been refused to try the validity of the election of a churchwarden: *Rex v. Dawberry*, 2 Str. 1196. There are two cases in which rules to show cause, etc., have been granted by this court to decide the validity or the election of vestrymen and churchwardens: *The Commonwealth v. Cain*, 5 Serg. & R. 510, and *The Commonwealth v. Woelper*, 3 Id. 29, 52 [8 Am. Dec. 628]. In the former, the rule was discharged, and in the latter it was made absolute; and the defendant was convicted and removed from office. But in both these cases the parties on each side claimed under the same charter; neither was it questioned whether an information would lie; both being willing to have the election decided in that way. In the present instance, those who press the information disdain the charter. And in this they are very right; for if the charter is to govern, the case is against them. No authority has been shown for an information in a case like the present. Its being a very convenient remedy, is not cause sufficient. And, indeed, if convenience were to be consulted, there are two sides to the question. By interfering too promptly in disputes of this kind, we might introduce a flood of business which would sweep everything else out of court. It is the opinion of the court that this is not a case proper for an information, and, therefore, the rule should be discharged.

Rule discharged.

FUNK v. VONEIDA.

[11 SERGEANT & RAWLE, 110.]

THE WORDS GRANT, BARGAIN AND SELL, by operation of the statute, are a covenant against all incumbrances done or suffered by the grantor. This covenant, if broken at all, is broken the moment it is entered into.

THE SPECIAL COVENANT arising from the use of the words grant, bargain, and sell is not impaired by a general covenant, not inconsistent therewith, nor by the fact that the incumbrances made by the grantor are duly recorded.

COVENANT AGAINST INCUMBRANCES, ACTION ON.—If there is an existing incumbrance when the deed is made, the covenant against incumbrances is at once broken; but no more than nominal damages can be recovered until the grantee has removed the incumbrance, or called on the grantor to do so, or has suffered loss from it. The grantee may remove the incumbrance before it is due, and if he does so, may recover of the grantor the amount necessarily paid to effect such removal.

THE ACTION OF WARRANTIA CHARTÆ described.

THE EQUITY POWERS of the courts of law in Pennsylvania considered.

ERROR to the Lancaster district court, in an action of covenant brought by the plaintiff in error against the defendants, executors of the will of William Bechtoll, deceased. The plaintiff declared on a covenant contained in a certain indenture made between himself and the said Bechtoll and wife, April 1, 1814, whereby the said Bechtoll and wife covenanted to and with the said plaintiff, among other things, that for the consideration therein expressed, they, "by the said indenture had granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by the said indenture did grant, bargain, sell, alien, enfeoff, release, and confirm unto the said plaintiff, and to his heirs and assigns," certain premises therein described. And the plaintiff further averred that the said Bechtoll, at the time of making said indenture "was not seised of an indefeasible estate in fee-simple in the lands and premises above mentioned, freed from incumbrances done or suffered from, and by the said William Bechtoll, but that at the time last aforesaid the estate in fee-simple of the said William Bechtoll, in the said premises, were subject to incumbrances, which had been done and suffered by him, the said William Bechtoll," and that the said Bechtoll and his executors "did not, nor have not, nor have either of them kept the said covenants, but had and have broken the same," to the damage, etc. Pleas, performance and payment, with leave to give special matter in evidence. The plaintiff gave in evidence a deed from Bechtoll and wife to himself, dated April 1, 1814, which contained a covenant of

special warranty. He also gave in evidence a mortgage from the said Bechtoll to the executors of John Bechtoll, dated April 4, 1812, for a certain sum payable in installments, the last of which was to become due April 1, 1830. He then offered to prove that he never knew of the incumbrance until in the year 1816; that when its existence became publicly known, his creditors pushed him, believing his property insufficient to pay said mortgage and all his debts; that to quiet their uneasiness, he appointed assignees who agreed to accept, and that a deed of assignment was prepared; that the assignees with the creditors' consent would have sold the property to the best advantage, if the defendants would lift the said mortgage; but that they refused, and that in consequence, one of the creditors brought suit, and arbitrators awarded in his favor two thousand six hundred and thirty-nine dollars and twenty cents, and on March 11, 1817, the whole of the premises were sold by the sheriff for two thousand eight hundred and fifty dollars. Objection being made, this evidence was rejected, to which ruling exceptions were duly taken and sealed. The court charged the jury, in substance, that no damage had been proved, and that on the covenant implied from the words "grant, bargain, and sell," under the act of assembly of May 28, 1715, no action would lie, although incumbrances existed until suit was brought upon them, or the plaintiff was otherwise actually damnified by them, that the mortgage being on record was notice to all the world, and that the plaintiff should have protected himself by express covenants; and that under the circumstances, the plaintiff's action was brought too soon, and could not be maintained; to which opinion exceptions were duly taken and sealed.

Porter and Buchanan, for the plaintiff in error.

Jenkins and Hopkins, for the defendants in error.

By Court, DUNCAN, J. The great change introduced by the act of assembly, rendering real estate subject to judicial sale for payment of debts, and the necessity imposed on our courts from the want of direct chancery jurisdiction of considering every equitable, tangible interest in land subject to levy and sale, produce, frequently, consequences which call for a liberal exercise of equitable powers accommodated to this new state of things.

I will consider the special errors assigned in the following order: 1. Whether any breach of covenant entered into by the grantor had occurred, so as to render him liable to any action without some evidence of direct, actual damages; and, 2

Whether the plaintiff, without having laid any consequential damages, could give any evidence of them—and this will dispose of the whole case. The words grant, bargain and sell, by the operation of law, and the express words of the act of assembly, are a covenant against incumbrances done or suffered by the grantor; in other words, that the estate was not defeasible by any act done by him. The action is brought on this covenant. Now, this covenant was broken the very instant it was entered into. The special covenant is by no means inconsistent with this general covenant. The implied covenant is not controlled by the special one—the effect of the words grant, bargain and sell, can only be limited “by express words contained in the deed.” Such is the direct provision of the act. There is no express limitation; and to imply one would be contrary to natural justice and the intention of the parties. It is an unqualified covenant against incumbrances done and suffered by the grantor, or those under whom he claims; nor can it make any difference that the mortgage was recorded, and the plaintiff had therefore constructive notice. It is no answer to his complaint to say it was his duty to search the record, and to have protected himself by some special covenant against this specific incumbrance. It was no part of this case that he had actual notice; but if he had, it could make no difference.

The plaintiff covenanted against all incumbrances. The rule as to the vendee is *caveat emptor*. So let the vendor take care of the covenants he entered into. There was no special stipulation on the subject, and the plaintiff might safely rely on the general one. Notice of the mortgage would make no difference, as we determined in *Levit v. Witherington*, 1 Lutw. 817. In an indenture reciting a lease, where the party covenanted that the original lease was good and unincumbered, an action of covenant alleging an incumbrance, notice of it was pleaded, and on demurrer, the plaintiff had judgment. An action on the case for deceit would, I apprehend, lie if there was no covenant, the incumbrance being sealed. In that action, notice to the grantee would be decisive in favor of the grantor; but it cannot alter the case in this action of covenant. The mortgage here was a subsisting incumbrance; the covenant was therefore broken—ouster or eviction was not necessary. An allegation of a breach as wide as the covenant was sufficient to entitle the plaintiff to nominal damages; and the defendants by pleading covenants performed, have admitted the existence of the incumbrance. A mortgage, though there can be no recovery on it until a year

after last installment becomes due, is a present incumbent weight on the inheritance from the moment it was given. The law on this subject is laid down with precision and accuracy in the very able judgment of Chief Justice Parsons in *Prescott v. Trueman*, 4 Mass. 630 [8 Am. Dec. 246]: "If a mortgage is the incumbrance, it being only a collateral security, the grantee can only recover nominal damages, unless he has removed it, because the mortgagee can compel the mortgagor to pay the debt, which is the principal security; but if the grantee has paid it, so that the mortgage is discharged, the sum secured by the mortgage is the measure of damages." And I am of opinion that where the mortgage-money is not due, but the grantee chooses to pay it, the jury ought to allow him the fair price it necessarily cost him; for it would be a most inconvenient doctrine to hold that the vendee was to wait ten years until the last installment became due, and the vendor a beggar. But whether the plaintiff paid it or not, still he was entitled to nominal damages—the covenant was broken. The mistake consists in supposing the eviction to be the breach of covenant; whereas, it is but a consequence of the breach; the breach was an immediate one. The existence of the incumbrance was the breach; consequential damages arose from the execution, but cause of action from the incumbrance; and here was the error of the learned judge, whose opinion was "that if no suit was brought, nor damages sustained, he was not damnified by any breach of covenant; the action was brought too soon. He could not support a suit of this kind until some damage was actually sustained; and until he was put to trouble by it from default of defendants in not discharging the incumbrances as they arose, he cannot complain of the covenant, and the mortgage being a record, was notice to all the world; it was the plaintiff's duty to search the record, and he might have protected himself by special covenants, and as he had not done so, he could not sustain his action."

On the second head of inquiry, it is to me evident that if the plaintiff had laid the consequential damages he offered to prove, the evidence should have been received; but as they were not laid, and not confessed by the plea of covenants performed, it is as evident the mortgage was properly overruled. If he had discharged the mortgage, this ought to have been stated as the actual gravamen. So if by a judicial sale he had sustained, as was alleged, the ultimate damages which he ever could sustain, this gravamen ought to have been laid. This is a new consequence, arising from the liability of lands to sale for payment

of debts. There being no court of chancery to which the grantee could apply for relief, and he would be remediless, unless he could recover in this action, we must apply the rules of equity to this state of things, unknown to the common law. It will not do to wait until the day of payment arrives, or until it pleases the mortgagee to proceed. The mischief is already done; he has sustained the ultimate damages he can ever sustain. The purchaser at sheriff's sale, as his assignee, could support no action as on a covenant running with the land; he has sustained no injury; and this even on the reason of the common law. The grantee ought to recover all the actual damages he has sustained by the grantor's violation of his covenant, because the very sale is a consequence of the incumbrance. If there is a judgment against him for the smallest sum, insufficient to condemn his lands by taking in the mortgage, which is a reprisal if due within seven years, his land is condemned and sold by means of this very incumbrance; sold for less, minus the mortgage-money. Is not this an actual damnification to this amount, occasioned by the breach of covenant? If it was a judgment with stay of execution, and the lands sold on a judgment against grantee, and the prior judgment against grantor, paid out of the proceeds of the sale, this is a damnification. So here, by the operation of law, a consequential damage arises from the delinquency of the grantor; in reality the plaintiff has sustained every possible damage he can sustain, he can suffer no more. It is the same thing to him as if the land had been sold on the mortgage given by the grantor. The equity of this case is to award to the plaintiff the fair, present value of the mortgage. In making that estimate, interest will be deducted for the nominal sum, as the installments become due, and if there are any bonds outstanding, though not due at the time of action or at the trial, deduct the interest until they become due, setting them off, and thus justice will be done all round. The weight of this incumbrance lessened the value of the land to this amount; for, instead of the full price of the land being received by the plaintiff, the purchaser holds it back to pay this incumbrance. No action could be maintained by the purchaser, because the covenant being broken, it was a chose in action not assignable: 2 Johns. 1 [*Greenby's Administrators v. Wilcocks*, 3 Am. Dec. 379]; 2 Mass. 455.

But if this was a continuing covenant running with the land, the assignee could maintain no action. He had sustained no damage. The damage had been sustained to the full value of

the covenant at the sale. A breach might have been assignable to cover the whole damages. The case of *Ancestor and heir* resembles this; when the ultimate damage is sustained in the life of the ancestor, and the land does not descend to the heir, the covenant which runs with the land does not descend to the heir; therefore, the executors shall recover the whole ultimate damages: *Lucy v. Livingston*, 1 Vent. 175; 2 Lev. 26. It seems to me to follow, even on principles of law, that the plaintiff is entitled to recover all the damages he has actually sustained, which is the full value of the mortgage. The leading decisions, English and American, will be found in a valuable note of Mr. Wheaton, to *Duvall and Craig*, 2 Wheat. 62. On the whole of this case, as the plaintiff had a cause of action, without proof of actual damage on the breach which instantly arose, at least, for nominal damages, and although the ground is untrodden, it is the opinion of my brother Gibson, as well as the chief justice giving no opinion, not having been present at the argument, that the plaintiff, by assigning specially the consequential damages arising from the breach of covenant, according to the evidence offered by him, stating that the land was of less value, by reason of the incumbrance, and that he was prevented from selling it as advantageously as he might have done, and that, in fact, it was sold by process of law for so much less, would be entitled to recover the full value of the mortgage. Whether a grantee could not, by calling on the grantor to remove the incumbrance, recover this value, where there has been no sale, no eviction, and even before the mortgage-money became due, is another question, which is not necessary now to decide; but in tracing this doctrine, both in courts of law and equity, it is by no means clear that in our mixed administration of law and equity he ought not. It would be very inconvenient if he should not. Transfers of the land are so very frequent, lands are so continually changing owners, the policy of our laws is so much in favor of removing every impediment in the way of alienation, and the hardship is so great in the grantee, who is entitled to the full benefit of his covenant, that I would feel a strong desire to relieve him, if, by an analogy to any principle of the common law or any rule of equity, it could be done. For the grantee to wait until he is evicted, locks up all property, suspends all improvements; for who would be willing to make improvements and wait till he is evicted, and when he, viz., the grantor, may be unable to make any compensation. The arguments *ab inconvenienti* are un-

answerable. And why should he not be obliged immediately to perform his covenants? If the buyer does not take a covenant, the rule of law is *caveat emptor*; let the seller then take care not to enter into this covenant.

In the antiquated action of *warrantia chartæ*, the good old common law contained some provision. A *warrantia chartæ* lay before any impleading, but the writ supposed an impleading. A man might have *warrantia chartæ quia timet implicari*, and recover *pro loco et tempore*, but no execution would be awarded; but if he be ousted after, he shall have his warranty on his first recovery; but it seems in that case he shall make request to the warrantor pending the assize to administer a bar: 22 Vin. 421; *Warrantia Chartæ*, F. pl. 1; Fitz. N. B. 134, K.; *Roll v. Osborn*, Hob. 22; Co. Lit. 100, a. And if the defendant appears, and says he is not impleaded, he, by this plea, confesses the warranty, and the plaintiff shall have judgment to recover his warranty: Fitz. N. B. 134, K. Fitzherbert there says: "It is to be observed, moreover, that it is good policy if a man suspects anything, to bring this writ of *warrantia chartæ* by times, because it binds all the lands of the warrantor from the time of the writ brought. There is a very strong and substantial reason why the writ of *quia timet* should issue before impleading." A *warrantia chartæ*, or writ of mesne, may be brought before the party take loss: *Crookhay v. Woodward*, Hob. 217. A writ of *warrantia* lies before damages and recovery *pro loco et tempore*: Br. Petition, pl. 26, recites 5 Ed. IV., 118. And all the ancient curious learning on this subject will be found in *Lynn Corporation v. London Corporation*, 4 T. R. 130. Suits *quia timet* are proper, both in law and equity. It is at law, if a *warrantia chartæ*. In equity, where A. had mortgaged the manor of Guildford for two thousand five hundred pounds, and then devised to B. for life, remainder in fee to C. C. preferred his bill to force B. to pay his share of the mortgage-money, and decided accordingly, and there have been twenty cases since of the like nature: *Hayes v. Hayes*, Ch. Cas. 223. So in *Ranelagh v. Hays*, 1 Vern. 189. Covenant to save harmless and on cause shown, a decree to clear the earl of Ranelagh from all incumbrances within a reasonable time; and the lord keeper compared it to a cautionary bond, where, although the surety is not troubled or molested for the debt, yet at any time after the money became payable on the original bond, the court will decree the principal to discharge the debt, "it being unreasonable that a man should always have such a cloud hanging over

Lim." So before day of payment, by Sir Thomas Powis, *arguendo*: Gilb. Eq. 69. Contract was to save harmless from payment of rent to the crown. Plaintiff suggested he was sued in the exchequer, but it was not charged in the bill here, or proved there, that the rent was behind, yet the court decreed it in specie, and the master to tax the damages: *Hayes v. Ranelagh*, 2 Ch. Cas. 146. Any covenant, though not specific, but only a general personal covenant for indemnity, will be decreed in chancery; for equity prevents mischief, and it is unreasonable a man should have a cloud continually hanging over him; yet it seems that where the incumbrance is not necessary, but contingent, you should recover no damages at law till a breach, and therefore ought not to decree it in equity: Gil. Eq. 5; Mos. 318; 1 Fonb. 41.

Chancellor Kent, in *Champion v. Brown*, 6 Johns. Ch. 406 [10 Am. Dec. 343], states it as a general principle that equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, on the principle *billa quia timet*, and in that case, the chancellor decreed specific performance, though no damages had been sustained, merely a probability that there afterwards might be. Here this incumbrance of the mortgage is not contingent; it is certain, and here is a breach of the covenant. It is a maxim in that court that equity prevents mischief: Francis's Maxims, Max. 8; and Fonbl. *ut supra*. The prevention, which should be one of the principal objects of our system of jurisprudence, constitutes a very important part of equitable jurisdiction. With a view to this object, courts of equity entertain suits *quia timet*. The very denomination of this bill was probably borrowed from the title of some ancient writs of common law; for, as Sir Edward Coke observes: Co. Lit. 100, there be some writs of law that may be maintained *quia timet*, before any distress, molestation, or impleading; and then he mentions a *warrantia chartæ*, before he be impleaded, and these may be called *brevia anticipantia*, or writs of prevention. The general principles of these bills are said to embrace every case. Where a person is apprehensive of being subjected to a future convenience, probable, or even possible to happen, or be occasioned by the neglect, inadvertence, or culpability of another, he may exhibit this bill *quia timet*, which will quiet the party's apprehension of future inconvenience by removing the causes which led to it." 1 Mad. Ch. 218. Now, as chancery would compel the execution of these covenants in specie, on a bill of *quia timet*, and as at the common

law some provision for security, even on suspicion, is given, before any breach or any eviction, I must confess it appears to me but reasonable to give the relief in our courts, by substituting the value of the incumbrance for the specific performance, which is a course very common in our courts. Here the common law is adapted to the general regulation of the transactions of man; its principles all tend to that end. If great inconvenience would result from the decision, which may be avoided by a different course, and if pursuing that course, no principle of the common law is infringed, so far inconvenience ought to affect the mind of a judge. Here the inconvenience is not only great, but the injury is irremediable. Every day new cases arise, and are determined on their own reason. The doctrine that in an action of covenant, on a covenant such as this, no more than nominal damages shall be given, until eviction or a payment of the incumbrance, can produce but little inconvenience, where there is a court of chancery, as the party may go into court, and by his bill *quia timet* cause the vendor to remove the incumbrance.

But here, where there is no such remedy, the reason which first introduced chancery principles and chancery relief into our courts could in no case hold stronger than in this necessity, lest there should be a failure of justice. Equity is now part of the law of the land, recognized not only in all courts of justice, but by the legislature, for arbitrators are sworn "justly and equitably to try the matter in variance;" and although it was originally but a borrowed jurisdiction, necessity has obliged the judges to adopt the maxims and principles of a court of equity among the rules of their decisions; and this necessary assumption of power is sanctioned by the constitution, which recognizes the powers heretofore usually exercised by them. That which is an established rule of property in equity must therefore be considered as such at law in Pennsylvania, says Bradford, J.: *Lessee of Barnes v. Hart*, 1 Yeates, 231. At the common law the party has a ground of action immediately on the covenant. It is but a question of mere damages. "What shall be the measure of the damages?" And I have but little difficulty in saying that the measure of damages is the full amount of the incumbrance. So that no principle of the common law is infringed; it is but an adoption of the writ of *warrantia chartæ*, and its principles to the action of covenant; and this by fair analogy to the common law, and the application of its principles to its substitute, the action of covenant, the ulti-

mate damages may be immediately recovered. If the purchase-money had not been paid, but bonds given, on the plea of payment with leave, the obligor could set up these incumbrances, the amount would be deducted from the bond, and this because the vendor ought to have discharged them. By parity of reason, where he has paid the purchase-money, he ought to recover back the amount of the subsisting incumbrance. Equity in the first case would enjoin, equity in the second case would decree a specific performance of the covenant, *quia timet*, before actual damnification. The same train of reasoning ought to produce the same conclusion in both cases, that courts of law should relieve, lest there should be a failure of justice; should exercise equity, powers *ex necessitate* in this form of action. In the construction of our system of law the principles of natural justice ought first to be considered. The wisdom of legislators in framing positive laws to answer all the purposes of justice has ever been found unequal to the subject; and therefore, in all countries, those to whom the administration of the laws has been entrusted, have been compelled to have recourse to natural principles to assist them in the interpretation and application of positive law, and to supply its defects; and this resort to natural principles has been called judging by equity. Hence a distinction has arisen in jurisprudence between positive law and equity; but the administration of both has in most countries been left to the same tribunal; indeed, the decision by separate tribunals seems peculiar to English jurisprudence, followed by many of the United States, in the supreme court of the United States, happily by giving the court an equity, and a law side, conferring all the benefits, without any of the inconvenience, expense and delay with which a court of chancery is charged.

In prescribing forms of proceedings to courts of justice, human foresight has also been defective, and therefore it has been commonly submitted to the discretion of the courts themselves to vary or add to established forms, as occasion and the appearance of new cases have required. The common law courts, though admirably calculated for the ordinary purposes of justice, were found not adapted to the full investigation of all the intricate and complicated subjects of litigation, which are the result of the increase of commerce, of riches and of luxury, and the consequent variety in the necessities, the ingenuity and the craft of mankind. To supply these defects the courts of equity gained an establishment, assuming the power

of enforcing the principles of natural justice, which the ordinary courts also decided, where the powers of those courts and the modes of proceeding are insufficient, and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. The principles of those decisions is considered by these courts as rules to be observed with as much strictness as the precepts of positive law; and though it is difficult in some cases, and impossible in many, for our courts, proceeding according to the manner and forms of the common law, to reach all the benefits of the extraordinary jurisdiction of the courts of equity, yet the inherent constitutional powers of the court are developing every day, and all the faculties of the mind employed in adopting rules of equity, and accommodating them to common law forms; and it is no good reason why we should not do anything because we cannot accomplish everything.

I only throw this out for consideration; it is extra-judicial, though not foreign to the question under consideration. The general ground of going into equity (as distinguished from law) is the want of remedy at law, and it is truth that the rules of law and equity are in a great measure the same. Perhaps it may be added that there is but this single rule in both, to do complete justice according to good faith and the sober intention of the parties in the matter transacted: Winne's Dialogues, 301. In common understanding, in valuing the interest of the plaintiff in this land, this *onus* put on by the defendant's testator, is a deterioration equal to the amount of the mortgage, is a deterioration and damnification of his estate to that amount, and is in substance as much an actual damage as if he had discharged the mortgage or been evicted. I have thought it necessary to notice at some length, because if it were omitted it might lead to some misapprehension that the decision was that the plaintiff could not recover effectually, unless there was an eviction, a judicial sale, or he had discharged the mortgage, which the court do not mean to give any binding opinion upon. It is the policy of the law to give redress to those only who are aggrieved. The plaintiff must state, in order to recover damages, the injury and the manner. Here it would seem he could state specific injury and specific damages.

Judgment reversed and *venire facias de novo* awarded.

Gibson, J., in *Smith v. Chew*, 15 Serg. & R. 205, where some of the questions under consideration were the same as those in the principal case, speaks

of the opinion here delivered by Judge Duncan in the following complimentary terms: "For the rest I cannot do better than refer to the very satisfactory opinion of my brother Duncan, in *Funk v. Voneida*, 11 Serg. & R. 115, who has, with his usual industry, brought together all the learning on the subject." In *Whitehill v. Gottwalt*, 3 Penn. 323, the principal case is cited and approved as to the nature and effect of the warranty imported in the words "grant, bargain and sell;" and the doctrine here laid down is referred to as a "fixed rule of property" in Pennsylvania. Upon the point that this covenant, if broken at all, is broken as soon as made, the principal case is followed in *Seitzinger v. Weaver*, 1 Rawle, 382. It is cited also in *Leber v. Kauffelt*, 5 Watts. & S. 443, to the point that one agreeing to indemnify another against an engagement is bound to save him harmless from all expenses devolved upon him by such engagement. In *Knepper v. Kuntz*, 58 Pa. St. 484, an apparent dictum of Judge Duncan as to the extent of the warranty implied from the terms "grant, bargain and sell" is thus corrected: "It is urged also that the words 'grant, bargain and sell' constitute an implied covenant not only against incumbrances done and suffered by the grantor, but by all who have preceded him in the title. A dictum by Judge Duncan to this effect in *Funk v. Voneida*, 11 Serg. & R. 110, is relied on. No such question arose in that case, which was that of a mortgage by the grantor himself. * * * The expression of Judge Duncan in all probability was a mere *lapse penne*, writing 'grantor or those under whom he claims' instead of 'grantor or those claiming under him.'" Whether this is the true explanation or not, it seems certain that Judge Duncan did not intend to say that this implied warranty extends to incumbrances done or suffered by those under whom the grantor claims, from the fact that in the beginning of the opinion the doctrine is correctly stated.

STEWART v. THE HUNTINGDON BANK.

[11 SERGEANT & RAWLE, 257.]

CORPORATION—EVIDENCE AGAINST.—The declarations of the officers of a bank are not evidence against it, if unauthorized by the board of directors.

IRRELEVANT EVIDENCE read to the jury on the promise of counsel, that he will follow it up so as to make it relevant, must not, when not so followed up, be argued upon by counsel, nor given to the jury for consideration.

EXCEPTIONS.—The counsel who takes an exception has the right to have it fixed immediately; but this may be done by a note in writing, without then drawing up the bill in full form.

ERROR to the common pleas. The opinion states the case.

Blanchard and Burnside, for the plaintiffs in error.

Potter and Hale, for the defendants in error.

By Court, **TILGHMAN, C. J.** This is an action of debt on a single bill, for five thousand dollars, given by the defendants below, who are plaintiffs in error, to the Huntingdon bank, dated the sixth of May, 1818, and payable one hundred and twenty days after date. Part of the money was paid before the

commencement of the suit. The plaintiff's demand was three thousand six hundred and fifty dollars, with interest from the twenty-seventh of April, 1819. Thirteen exceptions were taken by the counsel for the defendants, on the trial in the court of common pleas, but the whole may be reduced to a few principles. The defendants pleaded payment, with leave to give the special matters in evidence, and afterwards gave notice of the special matter which they intended to prove. The substance of this special matter was, that about the latter end of the year 1814, or beginning of 1815, a certain William Patton entered an agreement with the Huntingdon bank, by which the bank was to lend him ten thousand dollars, on the security of seven bonds from Edward B. Patton and David R. Porter, to the said William Patton, amounting to about the sum of eleven thousand dollars, with warrants of attorney to confess judgment thereon. William Patton was at the same time to give his own note for ten thousand dollars, with indorsers, which was to be received from time to time until the bank received full satisfaction for the ten thousand dollars lent to William Patton, with interest. But it was understood that the bank was to look to the assigned bonds only, and never to proceed against William Patton, or his indorsers on the note, which was given merely to comply with the form of the bank. The surplus produced by the bonds beyond the payment of the ten thousand dollars, and interest was to be applied to the payment of the single bill, now in suit, which was given by the defendants, in consequence of their being securities for William Patton, to the bank for another debt, due previous to, and at the time of borrowing the ten thousand dollars. The assigned bonds, if they had been prosecuted by the bank with due diligence, would have been sufficient to pay the ten thousand dollars and interest, and also the balance due on the single bill, on which this action was brought. But in consequence of the neglect of the bank, the defendants lost all benefits from them. This is a summary of the case which the defendants undertook to make out.

In the trial of the cause, the defendants produced and offered in evidence the seven bonds from Patton and Porter to William Patton, which had been assigned to the bank, and the court permitted them to be read in evidence, declaring at the same time, that it was understood the defendants were afterwards to prove that the bank had agreed to apply the overplus, after paying the ten thousand dollars and interest to the discharge of the debt now in suit. The defendants, after this,

offered in evidence the deposition of William R. Smith, which was rejected by the court, and on the propriety of that rejection the cause chiefly depends. Mr. Smith was cashier of the bank at the time of this ten-thousand-dollar loan. There was no objection to his competency, but only to the matter of his testimony, as irrelevant. His deposition, if received, would have proved that the board of directors of the bank had authorized the loan of ten thousand dollars to William Patton, on his assigning to the bank the seven bonds before mentioned, with warrants of attorney to confess judgment, and giving his own note with indorsers, for ten thousand dollars. And Mr. Smith understood, although his testimony is not quite positive, that no recourse was to be had to the drawer or indorsers of the notes. But he says nothing of any agreement that the surplus of the bonds should be applied to the discharge of the debt in suit. How then could his testimony be relevant? What had the defendants to do with these bonds, or the surplus which might arise from them? What right had they to call the bank to an account for negligence in collection? The surplus, there being no agreement to the contrary, belonged to William Patton, who might dispose of it as he pleased. It was on the principle of the defendants having no right in these bonds that the court below rejected the testimony. For the president said, that if any part of Mr. Smith's deposition proved an agreement of the directors of the bank that any portion of the proceeds of the bank should be applied to the debt in suit, they would admit it. And he called on the counsel for the defendants to point out any passage in the deposition which he considered as evidence under the principle adopted by the court, but this the counsel declined, and insisted that the whole deposition was evidence. I have examined that deposition very attentively, and can perceive nothing in it which proves anything like an agreement of the creditors of the bank, that the surplus of the bonds, should there be any, should be applied towards the discharge of the debt in suit, or any agreement, or order of William Patton that it should be so applied. I agree in opinion, therefore, with the president of the common pleas, that the deposition was not evidence, because no part of its contents was pertinent to the issue.

For the same reason the court was right in rejecting the deposition of David R. Porter, that only part of whose testimony that had a bearing on the issue, was "that the officers of the bank told him that the bonds were to be applied to the pay-

ment of the debt due by William Patton, and the money he was about to get." But surely, a corporation is not to be affected by loose declarations of this kind. Who the officers were that said this to Mr. Porter, we know not; nor was there any evidence that they were authorized by the board of directors, to speak of them. If this board did their duty in keeping written minutes of their transactions, these minutes might have been resorted to. But even supposing, as has been suggested, that this board kept no minutes, at the time of this transaction, and that parol evidence was, therefore, admissible, the declarations of their officers would not have bound them, without proof that they were authorized by the directors. And if they had been authorized there would have been no difficulty in it, as William R. Smith, the former cashier, was a competent witness. The depositions of Mr. Smith and Mr. Porter, being thus disposed of, a variety of evidence offered by the defendants falls with them. Such as the proof of the property of which Patton and Porter were possessed, when their bonds were assigned to the bank, and for some time after, the judgments which were afterwards obtained against them, by various persons, everything, in short, which had a tendency to prove that the amount of the assigned bonds might have been recovered but for negligence of the bank. But an occurrence of a singular nature afterwards arose in the trial of this cause. The bonds had been read to the jury, and the counsel for the defendants claimed the right of arguing on them, and sending them out with the jury. But this the court refused, because they had permitted the bonds to be read, on a condition to be afterwards complied with, which had not been performed; that is, the proof should be given of an agreement by the directors of the bank, that some part of the proceeds of these bonds should be applied towards the discharge of the debt in suit. In this opinion I think the court was perfectly right.

It has grown into a habit, within these few years, for counsel to propose a chain of evidence, the first links of which depend on those which follow, and would not be supportable without them. Now, although gentlemen of honor, and such I take the counsel in this cause to be, would scorn to impose on the court, by pledging themselves for what they knew they could not perform, yet, it may happen that there may be others who would make no scruple of liberal promises, provided they could smuggle into the jury-box a piece of evidence which ought not to have got there. The court should, therefore, keep a wary eye

on proceedings of this kind, and take care to instruct the jury to pay no regard to the evidence which they have heard, whenever the condition on which it was introduced is not complied with. Now, in the present case, the assigned bonds in themselves had no relation to the cause at issue. It lay on the defendants, therefore, to connect them with it by subsequent evidence, and failing to do this the bonds were out of the question. The counsel, therefore, had no right to argue on them as if they were in evidence, nor would it have been proper that the jury should take them out with them.

There is another bill of exceptions in the record, which though not much insisted on, ought not to pass unnoticed, as it is a matter of some importance in practice. The court was requested by the counsel for the defendants to suspend the trial until the bills of exceptions were drawn up in forms, and sealed by one of the judges. This the court refused, on account of the delay it would occasion, but a note of the exception was taken to be afterwards reduced to form. I do not know that the conduct of the court, in a case of the kind, is the subject of a bill of exceptions. There can be no impropriety, however, as the subject is before us, in giving our sentiments on it. The counsel who takes an exception has a right to have it fixed immediately; but this may be done without drawing up the bill in full form. A note in writing is sufficient, and such a note should never be omitted. We have frequently experienced great inconvenience from the want of it. In the present instance, however, the court did immediately reduce the substance of the exception to writing, so that there was no cause for complaint. The first and second errors assigned in this case were abandoned, and all the others have either been particularly noticed or fall so directly within the remarks I have made, as not to require further attention. I am of opinion that the judgment should be affirmed.

Judgment affirmed.

DECLARATIONS OF AGENTS OF CORPORATIONS stand upon precisely the same footing as to their admissibility in evidence as declarations of agents of private persons. Such declarations, if made at the time of the transaction under investigation, and within the scope of the agent's employment, are admissible against the principal as part of the *res gesta*, but if made after the event, or without the scope of the agent's ordinary employment, they are not admissible, unless expressly authorized: *Magill v. Kauffman*, 8 Am. Dec. 713 and note; *Angell & Ames on Corp.*, sec. 309, and cases cited. This is the doctrine laid down in the following decisions, where the principal case is cited on this point: *Bank of Northern Liberties v. Davis*, 6 Watts & S. 289;

Bank of Kentucky v. Schuylkill Bank, 1 Para. Sel. Cas. 243; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 344; and *Custar v. Titusville etc. Co.*, 63 Id. 385. "The cases are based on this principle: that what an agent says, does or writes at the time of making a contract, or when engaged in the discharge of his duty as agent, are admissible against the principal. But what the agent says or writes afterwards is not admissible: *Hough v. Doyle*, 4 Rawle, 294;" *Bank of Northern Liberties v. Davis*, 6 Watts & S. 289. In the case last cited, it was held, in accordance with this well-established principle, that the declarations of the cashier of a bank as to the genuineness of certain notes made at a period subsequent to their presentation, were not admissible against the bank. So the declarations of one who had been president of a corporation respecting payments previously made on certain notes were rejected in *Sterling v. Marietta etc. Co.* 11 Serg. & R. 179. So, where, although the declarations were made at the time of the transaction, they were of such a nature as not to fall within the ordinary authority of the agent, as implied from the mere fact of his employment: *Custar v. Titusville etc. Co.*, 63 Pa. St. 385. So, declarations made by a cashier of a bank to one who was about to indorse certain notes to be discounted by the bank, to the effect that he would incur no responsibility by so doing: *Bank of U. S. v. Dana*, 6 Pet. 51; *Bank of Metropolis v. Jones*, 8 Id. 12; *Merchants' Bank v. Marine Bank*, 3 Gill, 96. See also *Wyman v. Hallowell Bank*, 7 Am. Dec. 194; *Salem Bank v. Gloucester Bank*, 9 Id. 111. Declarations of this kind are not admissible, because they do not come within the implied authority of the agent. For other illustrations of the same doctrine, see the cases cited in the notes to Angell and Ames on Corp., sec. 309. The exclusion of the declarations in the principal case was clearly in accord with this doctrine, for, as stated in the opinion, it did not appear by whom or when the declarations were made; and besides, they seem to have been of such a nature as not to be within the scope of the ordinary employment of any agent or officer of the bank. The implied authority of an agent of a corporation is necessarily narrower than that of an agent of a private person, for the corporation itself, being a mere creature of the law, has only the circumscribed powers conferred by its charter, and those who deal with it may easily ascertain the extent of those powers: *Salem Bank v. Gloucester Bank*, 9 Am. Dec. 111, per Parker, C. J.; *Wyman v. Hallowell Bank*, 7 Id. 194. All its agents are, therefore, special agents with limited authority, beyond which they have no power to bind their principal.

EXCEPTIONS.—As to the correct practice in taking and sealing exceptions, the principal case is cited in *Conrow v. Schloss*, 55 Pa. St. 38, where the subject is very fully discussed.

WHITTING v. JOHNSON.

[11 SERGEANT & RAWLE, 323.]

PARTIES.—When the court, on the application of creditors, opens a judgment for the purpose of trying whether the bond sued upon was given to defraud creditors, it is not necessary that the latter be made parties to the action.

DECLARATIONS AS EVIDENCE.—In trying the question whether the bond on which judgment was entered was given to defraud creditors, the declarations of the defendant, made in the absence of plaintiff, are inadmissible.

BOND VOID IN PART IS VOID AS A WHOLE—A bond taken for more than the real debt, for the purpose of defrauding other creditors, is entirely void as against them.

ERROR to the common pleas. The opinion states the case.

Merrill and Greenough, for the plaintiff in error.

Lachells and Hepburn, contra.

By Court, **TILGHMAN, C. J.** The plaintiff in error entered judgment against the defendant, by virtue of a warrant of attorney on his bond, in the penalty of twelve thousand four hundred and fifty-two dollars and forty-two cents, conditioned for the payment of six thousand two hundred and twenty-six dollars and twenty-one cents, with interest. The court of common pleas of Union county, on the application of the creditors of the defendant, permitted the judgment to be opened for the purpose of trying whether the bond was not given, in a contrivance between the plaintiff and defendant, to defraud the creditors. Six errors have been assigned.

The first is that the creditors ought to have been made parties to the suit. There is nothing in this. The court of common pleas might, in their discretion, have ordered the question of fraud to be tried in a feigned issue; and perhaps that would have been the most convenient way. But they were not obliged to do this. They took the course which has been very commonly pursued of going to trial with the original parties, and no other, on the record.

The second, third, fourth and fifth errors turn pretty much on the same principle. The court admitted evidence on the part of the defendant, of declarations made by defendant, respecting the debts which he owed the plaintiff. The second error, indeed, is something different from the others, for the declaration of the defendant, there was no other than an opinion delivered by him in the course of conversation on a point of morality, viz.: "That if a man could not make both ends meet, he ought to secure something for his family." A declaration of this kind was a symptom of incorrect principles, but had no relation to the issue on trial. Even if it proved the defendant to be a knave, the plaintiff could not be affected by it. The third, fourth and fifth errors were declarations concerning the amount of the debt due from the defendant, and if admitted would have shown that the bond was taken for more than the real debt. But these declarations were made in the absence of the plaintiff, nor was it pretended to be shown that he assented

to them. It would be most unjust, therefore, that they should be received as evidence against him. This very point was decided by us in the case of *Wolf v. Carothers*, 3 Serg. & R. 240.

The sixth error is an exception to the charge of the court, which was, "That if the bond was taken for more than the real debt, with an intent to defraud the creditors of the obligor, the whole bond was void as to the creditors." The counsel for the plaintiff in error have not insisted on this point, and, indeed, they ought not. By the statute of Elizabeth, where the intent is to defraud creditors, the instrument by which the fraud is to be effected is void. It is the opinion of the court that the judgment should be reversed and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

OPENING JUDGMENT AS FRAUDULENT.—The practice of opening judgments at the instance of creditors, on allegations of fraud, as was done in the principal case, is thus approved in *Sommer v. Sommer*, 1 Watts. 305: "This method of trying the question of fraud by opening the judgment so far as to give the party intended to be defrauded an opportunity of showing the existence of collusion, is a very common one, and though less technical, it is quite as convenient as a collateral issue, requiring less nicety in pleading, and serving equally well to inform the conscience of the court in directing the process of execution. It was recognized in *Whiting v. Johnson*, 11 Serg. & R. 323, as being equivalent in all respects to a feigned issue." It was there held that the defendant in the judgment was a competent witness to prove the fraud. It was said, however, by Gibson, J., in *Gallup v. Reynolds*, 8 Watts. 426, that the correct practice was to try collusion by a collateral issue but matter of defense by an issue in the cause, but that this distinction seemed not to have been attended to in the principal case. Indeed, from the remarks of the same learned judge in *Shulze's appeal*, 1 Pa. St. 254, it is apparent that he did not regard the method used in the principal case with much favor. A different practice seems, at that time, to have been adopted by statute, and it was held in that case that where a single creditor petitioned for an issue to try the question of fraud in a judgment confessed by his debtor to another creditor, the issue was not between the original parties, but between the petitioner and the judgment-creditor, who were respectively plaintiff and respondent, and that other creditors who did not petition could not derive any benefit from the proceeding. Gibson, C. J., delivering the opinion of the court, said: "The motion to open the judgment in *Whiting v. Johnson*, 11 Serg. & R. 323, which is appealed to as a precedent, was made in behalf of the creditors generally; and to complete the parallel, the petition should also have been signed by the creditors generally, the very thing on which the case is deficient. At that time, the practice was not to award a collateral issue, but to open the judgment, as it was termed, on motion, sustained by affidavit, and try the matter on pleadings in the action ostensibly between the original parties; but the creditors, though not formally parties, were actually so. The proceeding was one of those miserable shifts to which we were driven for want of the powers of a court of chancery. The statute on which the present proceeding is founded directs that a suggestion of fraud

be tried in a collateral issue to which the parties may be fabulous; but it seems to be forgotten that, as the whole is a chancery proceeding, the names of the actual parties ought to appear as complainants and respondents. If they do not, we shall have gained little by the statute."

It was held in *Ludlow v. Dutton*, 1 Phila. 226, that "nothing is better settled than that a mere general creditor shall not intervene to stop the execution of a judgment which may be fraudulent and void as to him, but which is good between the parties. *Whiting v. Johnson*, 11 Serg. & R. 323, is not against this, for it is not stated there what kind of creditors had been let in below, and besides in error that point did not arise."

DECLARATIONS AS EVIDENCE.—On this point the principal case is cited in *United States v. Mertz*, 2 Watts. 407; and *Pringle v. Pringle*, 59 Pa. St. 269.

A GRANTEE IN A FRAUDULENT DEED who participates in the fraud, or knowingly assents to it, cannot, as against creditors of the grantor, avail himself of such deed, even to secure a just debt: *McKee v. Gilchrist*, 3 Watts. 233, 234, citing the principal case.

PETRIE v. CLARK.

[11 SERGEANT & RAWLE, 377.]

EXECUTORS—TITLE OF.—At law the executor becomes for most purposes the owner of the legal title to the goods of his testator, and may dispose of them as if they were his own, except that he can not bequeath them, nor can they be taken on execution for his debt. In equity he is treated as a trustee for the creditors and legatees.

IDEM—REMEDY FOR CHATELS FRAUDULENTLY DISPOSED OF BY.—If an executor disposes of goods to one who is not a purchaser, for a valuable consideration, or who is guilty of fraud or collusion with the executor, the remedy of the creditors and legatees is in equity where the person so acquiring the goods will be decreed to hold as their trustee and for their benefit.

IDEM—A PURCHASER FROM an executor is not bound to see to the application of the purchase-money.

IDEM—PLEDGE OF ASSETS.—If an executor deliver to one of his creditors a note belonging to the decedent as security for a note made by the executor in place of a prior note given by him to the same creditor, the latter is not a holder for value of the note so pledged to him, and cannot retain it as against the creditors of the decedent.

ERROR to the common pleas in an action brought against the plaintiff in error on a certain promissory note made by him. At the trial the defendant offered evidence to prove the following facts: That the note in suit was given by the defendant for goods purchased of the executors of one Rodgers, being part of the estate of the deceased, the note being drawn in favor of one who was the defendant's surety, and by him indorsed in blank, and delivered to said executors; that Smith, one of the executors (now insolvent), being indebted to the plaintiffs for certain

goods, had given them his note therefor, which fell due July 18, 1822; that being unable to pay the note at maturity, he made another in lieu of it, and delivered it to the plaintiffs' agent; and, that without the consent of his co-executor, who took active part in the duties of the executorship, the said Smith deposited the defendant's note with said agent as collateral security, taking his receipt therefor, stating the contents of said note, and the conditions upon which it was to be returned; that before the maturity of the defendant's note the executors of Rodgers, on behalf of the creditors and legatees, gave the defendant written notice of these facts, and warned him not to pay the note to any one but themselves, but it was admitted that at the time of the transfer of the defendant's note the plaintiffs and their agent were ignorant of the circumstances under which it came to Smith's possession. This evidence was all rejected to which the defendant excepted, and brought the case here by writ of error.

Biddle, for the plaintiff in error.

Craft, for the defendants in error.

By Court, GIBSON, J. The question here turns on the right of creditors and legatees to follow assets that have been collusively parted with by an executor; which involves a course of inquiry somewhat different from that which had been pursued by the counsel. This right is never claimed on the supposed existence of a lien. Neither can it be claimed at law; for the executor is the owner of the legal title to the goods and may dispose of them by any species of voluntary alienations by which he may dispose of his own. The remedy is invariably in equity; where it is afforded on the ground that the executor, although complete owner of the legal title, is, *quasi*, a trustee for creditors and legatees, whether pecuniary, specific or residuary; each of which classes, notwithstanding what was thought of it in the earlier cases on the subject, is entitled to equal relief. Here the defendant stands in the situation of a stockholder, who might compel the plaintiffs and the creditors and legatees to interplead, provided we had a court of equity to entertain a bill for that purpose, or the creditors and legatees might file their bills against the present plaintiffs directly; and there is, therefore, no doubt that the merits might be tried between them in the shape in which the defense was offered at the trial.

The ground of relief, as I have said, is that the executor has the legal title to the goods in some respects only as the trustee;

and equity, therefore, will follow them into the hands of any one who is not a purchaser for valuable consideration, or who, having paid a valuable consideration, has been guilty of fraud and collusion with the executor. This is, in effect, to declare such person trustee for those who have the beneficiary interest. Although there is no doubt of the general principle as stated, there is some inconsistency of decision as to what constitutes fraud and collusion. In two of the earlier cases on the subject: *Ewer v. Corbel* and *Burting v. Stonard*, 2 P. Wms. 248, 249, it was held that if the executor sell a term which the testator has specifically devised, the purchaser shall hold it, unless he was apprised that there were no debts, or that they could be paid without breaking in on the specific legacy; or unless he has purchased it at an under value. Notice of these facts is notice that the executor is abusing his trust by wantonly defeating the provisions of the will; and this, therefore, is a case of collusion. In *Nugent v. Gifford*, 1 Atk. 143, the executors assigned over a mortgaged term in payment of his own debts, and this was held good against the daughters of the testator, who were creditors under a marriage settlement.

The same principle was asserted in *Jacomb v. Harwood*, 2 Ves. 265, and in *Meade v. Lord Orrery*, Id. 285, but it was ruled differently in *Crane v. Drake*, 2 Vern. 616, the authority of which is certainly strengthened by the reversal of *Humble v. Bill*, in the house of lords, 2 Vern. 444, notwithstanding what Lord Hardwicke says of these two cases in *Meade v. Lord Orrery*. Indeed, any mind is not prepared implicitly to acquiesce in the decision by that chancellor, of any of the cases that came before him. A purchaser from an executor is not bound to see to the application of the purchase-money; and the assignment of a chattel in payment of an antecedent debt is assignment for a valuable consideration; so far I agree. But the executor is not, even at law, the owner of the goods to every intent; he has only a qualified property in them, insomuch that he cannot bequeath them, nor can they be levied for his debts, even by his own permission, whereas they may be levied, in the first instance, for the debt of the testator when those of the executor could not, which clearly shows a distinction. In chancery, however, the executor's interest is purely fiduciary; and the law exacts from the dealing with him, with full knowledge of his representative character, the most perfect good faith. Now the assets are a fund in his hands, not for the payment of his own debts, but the debts of the testator, and the legacies bequeathed in the will;

and where the assignee knows at the time that he is receiving his debt out of a fund which is not the property of the persons paying, but which is appropriated to the payment of other debts, that alone is a circumstance of suspicion that ought to put him on inquiry as to the propriety of the transaction. An executor may, in some cases, with strict propriety, convert the the assets to his own use, as where he has paid debts of the testator to the value with his own money; but where the assignee finds him in the first instance, applying the assets out of the ordinary cause of administration, it may bear on argument, whether he does not take upon himself the risk of the executor's right to apply them, or of his ability to replace them if they were improperly withdrawn from the fund; and later cases, I think, have gone this length.

It is no answer to say that the executor may sell the goods and pay his debt with the price, if the creditor knew that the payment made under these circumstances would prejudice the creditors or legatees, he would be a party to the *devastavit*, and liable to refund; for money, where it has been received *mala fide*, may be followed as readily as a chattel. But in *Tanner v. Irie*, 2 Vern. 469, Lord Hardwicke seems to doubt the firmness of the ground on which he had before stood, and to wish to be understood as having decided those cases not on general principles, but on their peculiar circumstances. It may be supposed, however, that his doctrine derives force from the analogy between the particular case of which I have been speaking, and that of a note drawn by a partner in the name of a firm for a separate debt of such partner antecedently contracted; with respect to which it has been held in the last case on the subject, *Bidley v. Taylor*, 18 East, 175, that the fact of the creditor having known at the time that the name of the firm was used for the partner's private benefit is not sufficient *per se* to invalidate the transaction. With respect to this, it is enough to say that the law had all along been held differently in England; as it is still held so in Pennsylvania, New York, and, I believe, in most, if not in all, of the other states; so that the authority to be derived from this source is against Lord Hardwicke's doctrine, instead of being in favor of it.

The cases which I have cited on the subject of an executor's power over the assets are the principal ones that were decided before the American revolution; and notwithstanding the discrepancy that is found in them, as to what circumstances constitute fraud or collusion in contemplation of law, they undoubt

edly concur in proving the general principle as I have stated it. The latter cases have gone much further in circumscribing the executor's authority over the assets; and, with great propriety, very far to overrule Lord Hardwicke's decisions that an assignee of the assets for his own debt cannot be disturbed, except on specific evidence of actual and positive collusion. That, however, is not the point on which the case before us turns; a more material inquiry will be made in regard to the difference between an assignment in payment of antecedent debts and a pledge as a security for it.

In regard of a pledge there is a decisive difference between the pawning of a security for an antecedent debt and the pawning of it for money advanced at the time. As to the first, all the cases agree that the interest of the pawnee is defeasible by creditors or legatees; and as to the second, the validity of the contract depends on all those considerations that would affect an absolute sale under like circumstances; that is where it appears the pawnee knew that the money was obtained for purposes foreign to the executor's duty, the transaction is to be considered as collusive. Then to come to the facts of the case before us. The note on which suit was brought was indorsed to the executors in blank for goods purchased from them, which were part of the assets, and the note itself was consequently assets in their hands. The executor who had this note in possession was indebted to the plaintiff on his own promissory note to nearly the same amount; and after his note had become due, made an arrangement with the plaintiff by which it was taken up, and a new note at five months substituted in its stead, and the note on which suit is brought was handed over with the blank indorsement of the payee as collateral security for the payment of this debt, the other executor being no party to the transaction, and the plaintiff being entirely ignorant of the circumstances under which the note in question came to the hands of the executor.

On this naked statement of facts, it will be seen that collusion is altogether out of the case, and that the question is whether the plaintiff is to be considered as a holder for value. If the note had been delivered to him in discharge of the debt, there would be no difficulty in saying, in the absence of collusion, that taking it in the usual course of business as an equivalent for a debt which is given up would be a purchase of it for a valuable consideration. But as it appears on the bill of exceptions that it was given in pledge for securing an antecedent debt which

was not discharged, but suffered to remain, and as it does not appear that money was advanced, or any act done that would in law be a present consideration, the case presented was against the plaintiff. The evidence, therefore, *prima facie* made out a defense; although it might, I apprehend, have still been shown on the other side that the plaintiff had a right to recover, provided he had been able to prove that time was given in consideration of obtaining the note in question as security for the debt, and that in consequence the debt was lost. The giving of time would be a present and a valuable consideration, and a pledge on these terms would be the same as a pledge for money paid down.

There is nothing in the commercial nature of the security to vary the nature of the transaction. Where the holder of a note or bill has paid value for it, he is in privity with the first holder: *Collins v. Marten*, 1 Bos. & P. 651. There is a difference between a note regularly negotiated, which always supposes a consideration, and a note placed like the present in the hands of a creditor merely as a security, which, in this respect, stands exactly as it would if it were a bond; that is, as a mere pledge, subject in the hands of the holder to every equity that could be set up against it in the hands of the person from whom he obtained it: *Roberts et al., Executors of Horseman v. Eden*, Bos. & P. 398. In this respect equity and the commercial law perfectly agree, both being founded on principles of reason as well as convenience. The question then is, whether the plaintiff is a holder for value; and as the case stands on the bill of exceptions, the evidence went directly to prove that he was not. At all events, an inquiry into the whole transaction was proper, and there is no rule of commercial law which forbids it; the evidence, therefore, should have been admitted.

Judgment reversed, and a *venire facias de novo* awarded.

EXECUTOR DISPOSING OF ASSETS.—“It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is that the executor or administrator, in many instances, must sell in order to perform his duty in paying debts, etc., and no one would deal with an executor or administrator, if liable afterwards to be called to an account:” *Williams on Ex.* 932; *Bond v. Zeigler*, 1 Ga. 344; *Rayner v. Pearsall*, 3 Johns. Ch. 578; *Hertell v. Bogert*, 9 Paige, 52; *Gray v. Armistead*, 6 Ired. Eq. 74; *Bradshaw v. Simpson*, Id. 243; *Wilson v. Doster*, 7 Id. 231; *Polk v. Robinson*, Id. 235; *Thomas v. Reister*, 3

Ind. 369; *Speelman v. Culbertson*, 15 Id. 441; *Hamrick v. Craven*, 39 Id. 241; *Hough v. Bailey*, 32 Conn. 288; *Makepeace v. Moore*, 5 Gilm. 474; *Walker v. Craig*, 18 Ill. 116; *Williams v. Ely*, 13 Wis. 1; *Boys v. Vilas*, 18 Id. 169; and see *Sutherland v. Brush*, 11 Am. Dec. 383, and note; and *Field v. Schiefelin*, Id. 441. Says Nisbet, J., in *Bond v. Zeigler*, 1 Ga. 344: "Without such a power of disposition, an executor could not execute the trust devolved upon him, and therefore no one would be found to fill fiduciary situations. The departed would in vain have left wills, for nobody would execute them. Without such immunity to purchasers, no one would deal with an executor." A well-recognised exception to this general doctrine is, as laid down in the principal case, that where there is collusion between the executor and a purchaser, or a fraudulent design on the part of the executor to waste the assets, which is shared by, or known to, the purchaser, the property may be followed into his hands: *Williams on Executors*, 936. See the note to *Sutherland v. Brush*, 11 Am. Dec. 383, where this subject is discussed, and the principal case commented on. It is clear, also, that where the purchaser is thus a party to the fraud, the property in his hands is still affected with the trust, notwithstanding the sale. Hence, as declared by Gibson, J., the appropriate remedy is in equity, which takes peculiar cognizance of the enforcement of trusts of every nature: *Story Eq. Jur.*, sec. 1257. The doctrines laid down in the principal case on this subject are approved in *Sims v. Chew*, 15 Serg. & R. 206; *Trotter v. Shippen*, 2 Pa. St. 360. The power of an executor or administrator to dispose of the assets of the estate is now in many of the states limited and regulated by statutes, which require an order of court even for the sale of personalty.

CITATIONS.—Upon the point that where a negotiable instrument is assigned or transferred as collateral security for an antecedent debt, without any new consideration, the assignee is not regarded as a *bona fide* purchaser for value, so as to shut out the equities between the original parties; the principal case is cited and approved in *Irwin v. Tabb*, 17 Serg. & R. 423; *Hartman v. Dowdel*, 1 Rawle, 282; *Depeau v. Waddington*, 6 Whart. 232; *Kirkpatrick v. Muirhead*, 16 Pa. St. 123; *Lord v. Ocean Bank*, 20 Id. 386; *Garrard v. Pittsburg etc.*, R. R. Co. 29 Id. 160; *Tritt v. Colwell*, 21 Id. 234; *Welsh v. Cabot*, 39 Id. 357; *Bayler v. Commonwealth*, 40 Id. 44; *Lenheim v. Wilmarling*, 55 Id. 76. But where time is given for the purpose of obtaining the new security, or where the debt is discharged by it, the transferee is a purchaser for a valuable consideration: *Irwin v. Tabb*, 17 Serg. & R. 423; *Hartman v. Dowdel*, Rawle, 282; *Depeau v. Waddington*, 6 Whart. 232; *Muirhead v. Kirkpatrick*, 21 Pa. St. 242; *Taylor's Appeal*, 45 Id. 63. For other decisions in which the principal case is cited and relied upon as authority, see, *Appleton v. Donaldson*, 3 Pa. St. 386; *Ludwig v. Highley*, 5 Id. 140.

McPHERSON v. CUNLIFF.

[11 SERGEANT & RAWLE, 422.]

THE ORPHANS' COURT is a court of record, invested with chancery powers, conducted by chancery rules, and acting on and controlled by the principles of courts of equity.

CONVEYANCE BY AN HEIR APPARENT estops him from recovering the property, when it subsequently descends to him.

ESTOPPELS OF VARIOUS KINDS explained and commented upon.

ESTOPPELS AGAINST HEIRS AT LAW.—An heir at law may be estopped by his acts, or by a judicial proceeding to which he is a party, or by receiving the benefits of a transaction or proceeding.

ESTOPPEL FROM PROCEEDINGS OF COURTS OF PECULIAR JURISDICTION.—If any matter belongs to the jurisdiction of one court so peculiarly, that other courts can only incidentally or indirectly take cognizance of the same subject, the latter are bound by the sentence of the former.

ORPHANS' COURT PROCEEDINGS for the sale of lands, are proceedings *in rem* against the estate of the intestate.

ORPHANS' COURT.—The jurisdiction of this court is dependent upon the death of the intestate. Letters testamentary or of administration on the estate of a living man are void.

ORPHANS' COURT SALES cannot be attacked collaterally for irregularities, mistakes or errors in the proceedings of the court. Purchasers need only inquire whether the sale was ordered by a court having jurisdiction to order it. Orphans' court sales are protected from collateral attack to the same extent as those made under execution.

ERROR to the common pleas to reverse a judgment for the defendants in an action of ejectment brought by the plaintiff in error. The facts were: James McPherson, the father of the plaintiff, and plaintiff in error, emigrated from Ireland in 1783, leaving there a lawful wife, still living at the commencement of this suit, but by whom he had no issue. He came to Pennsylvania about 1786, bringing with him the plaintiff's mother, and a daughter by her. They lived together as man and wife, and held themselves out as such from that time until 1793, when they separated. The plaintiff was born in 1786. The plaintiff's father purchased the land in question, which was then a vacant lot in Pittsburgh, of small value, in 1790, and erected a house thereon, in which he and his family lived. After the separation of the plaintiff's father and mother, the father left the state, and died intestate in 1794, or 1795, seised in fee of the premises in controversy. In February, 1795, the plaintiff's mother and Samuel McCord took out letters of administration on the estate of James McPherson. The personal estate amounting only to one pound nine shillings and five pence, the administrators presented a petition to the orphans' court, setting forth all necessary facts, and praying an order to sell a moiety of the lot. The order was granted, and the sale was made of one fourth of the lot to Abner and Jesse Barker, and of another fourth to one Stroop, which sales were returned to and confirmed by the court, and conveyances were executed accordingly. These sales not producing a sufficient sum for the purposes for which they were made, the administrator on December 9, 1795,

presented a second petition, setting forth the prior petition, order of sale, and sales made pursuant thereto, and that the proceeds were insufficient to support the widow and children, and praying an order to sell another fourth. The sale was thereupon decreed, and a fourth of the lot sold to one Carothers, for seventy-five pounds, which sale was duly confirmed, and a deed executed. Prior to any of these sales an inventory was filed, but no written statement of the debts was exhibited. It was proved, however, that there were some debts, some of which were debts of record. In March, 1796, a regular administration account was settled, and confirmed by the court, in which the administrators charged themselves with the amount of the inventory, with one debt not therein included, and with the proceeds of the sales above mentioned, and claimed credit for debts paid, for expense of maintaining the children and erecting a brick house on the fourth of the lot left unsold. There was a balance on the first sale of over four pounds, which was applied to the erection of said house for the widow and children. It appeared also that guardians were appointed in the orphans' court for the plaintiff and his sister as legitimate children of the deceased. In 1803, it was accidentally discovered that the intestate was married to the plaintiff's mother in 1790. There was no charge that there was any collusion between the administrators and the purchasers at the sales above mentioned, or any unfairness or inadequacy of price in those sales, or that the purchasers had any knowledge of the illegitimacy of the children. The defendants derived title *bona fide* and for large consideration from those purchasers, and it appeared that buildings worth twenty thousand dollars had been erected on the parts so sold, and that the reputed widow and the children had constantly resided in the house erected out of the proceeds on the part reserved. In 1815, the plaintiff discovered that his father had a wife in Ireland, and he accordingly went there and bought the interests of his father's heirs in the premises, and under their conveyance brought this ejectment. It is not deemed necessary to insert the charge of the court or the exceptions taken, as the only points considered by this court are sufficiently stated in the opinion.

Bidwell and Campbell, for the plaintiff in error.

Baldwin and Ross, for the defendants in error.

•By Court, DUNCAN, J. This is a novel and very extraordinary case. During its discussion, I must confess that I felt some

alarm from the great gravity with which the argument on the general question was put, and the zeal and ability with which it was argued by the counsel of the plaintiff in error, lest we should be compelled to give one of the most unjust judgments ever given in a court of justice; for it would be difficult for the warmest imagination to figure a claim more destitute of every color of justice and equity, than in reality the demand of the present plaintiff is. Brushing from my remembrance, as far as it is possible to efface and overcome the unfavorable impressions which will be made from the survey of the whole transaction, and bringing to the consideration of the various questions that arise on it, a mind, I trust, free from all unjust prejudices, after a very full and anxious inquiry and deliberation, my understanding and my judgment are convinced that, as it is void of all grace and decorum, so it is unsupported by any principle of law, and in opposition to every sound principle of justice and good sense. This is the history of the transaction. (His honor here recapitulated the principal facts.)

The marriage by John Wilkins, in 1790, neither makes these children more nor less bastards. The father had a former wife living at their birth, the illegitimacy is clearly established. From the silence of the parties to this ceremony, and its secrecy, for it was known only to the justice, and in 1803, discovered at his death by accident in his docket, we must conclude that secrecy was observed to give to the children the rank in society which they would hold as lawful children, not subject to the reproach of bastardy. The plaintiff now demands the surrender of this property, with all its valuable erections of twenty times greater value than the naked lot, because, as he says, all the proceedings of the orphans' court are null and void, founded in error and mistake; that nine years after he came of age, twenty years after the sale, he has discovered that his father had a wife in Ireland; that his father was guilty of adultery and bigamy, and that his mother was an unchaste woman, and he a bastard; and that he made a trip to Ireland, found out the just heirs, obtained a conveyance from them for the whole lot and buildings for less than the three fourths of the naked lot sold for, to pay his father's debts, and support himself, his mother and sister, and put a building on the reserved fourth. He has fully established his own illegitimacy, and that the grantors are the lawful heirs of James McPherson.

If the administrators had not asked by petition for a sale but suffered what they otherwise could not have prevented, a

sale on a judgment and execution for the debts of decedent, all the lot must have been irretrievably gone. The balance, if any, after payment of the debts, would have come to the hands of the administrators, and they alone would then be accountable. What gave birth to the present controversy was the discovery thus lately made of the illegitimacy of those children, and the effect of that fact, which is clearly established, upon the sales, is the great question. As a great question it has been considered, and very ably argued by the counsel on both sides, and it merits consideration as a great and an important question. For it is now to be considered whether all these proceedings, decrees of the orphans' court, sales and confirmations by the court, vast improvements made, titles derived, possession long continued on the faith of these decrees of the orphans' court, a court of record having competent jurisdiction, are null and void, and that they are to be so decreed indirectly in ejectment, an original action, while these decrees remain unreversed and in full force.

There are minor objections, the want of adherence to prescribed *formulae*, and to certain ceremonial observances. These will be considered in the sequel, so far as it may be deemed necessary to notice them. If the plaintiff fail to support that which his counsel have properly considered as his stronghold, the position that all the solemn proceedings of this court of record, invested with chancery powers, conducted by chancery rules, and acting on and governed by the principles of a court of equity, are mere nullities, he cannot recover; but if as between the present defendant and the heirs at law of James McPherson, they, as plaintiffs, could recover, it is an inquiry of great moment; can this plaintiff, having acquired the title, have any *status in curia* from the relation in which he stands to the defendants? That is, can they estop him, stop his mouth, when he opens it with an intention to proclaim his own bastardy, and on that ground defeat their title? It must be constantly kept in view that they do not claim title under the heirs of James McPherson, their title is paramount. They say that the absolute descent to them is *quo modo* suspended until the debts of the ancestor are paid, that the descent is interrupted by the proceedings of the orphans' court, and defeated by the judicial sale. There are legal and equitable estoppels. Legal, where the law estops a man to falsify a judicial act to which he is a party, and from which he has received a benefit; and equitable ones which will estop him from using a title which in good conscience ought

to inure to the use of another. To give an example in the outset. If John McPherson had sold and conveyed this lot to another in the character of lawful heir of James, his father, and he is not his heir but a bastard; and on discovering this, he purchased from the lawful heir, he never could recover. He could be estopped. There are legal estoppels from the operation of which chancery would relieve, but here the want of conscience is in setting up the bastardy.

In general the law is, that the grantor is estopped by his own deed to say that he had no interest, when by a subsequent deed he acquires a title. As where an heir apparent having the hope only of succession, conveys during the life of his ancestor, an estate, which afterwards descends to him, he is estopped to say he had no interest at the time of his grant. These estoppels run with the land into whatever hand it comes. As if A. makes a lease by indenture, of black acre, and after purchase conveys it to B., B. is bound by this estoppel: *Travannion v. Lawrence*, 2 Salk. 266. These estoppels are found in law, honor and conscience, and the true reason is that a man having received a benefit in one character, the value of the thing, shall not afterwards recover the thing itself in another character. This legal and equitable principle runs throughout all the transactions and contracts of life. As in an action by the assignee of a patentee against the patentee himself, he is estopped from saying that it was not a new invention, because he has received the benefit of it as such, and though all the world else may show this he shall not be permitted to do it. The justice of this principle is stamped on every human breast civilized or savage, the wild man of the forest and the civilized man in a social state.

Estoppel stoppeth the mouth of a man to allege or plead the truth, by matter of record as by letters patent, common recovery, pleading, confession, admittances and acceptances; every act of a party where a court of record has jurisdiction estops him; for no man shall be permitted to make an averment against a record. When the record of the estoppel goes to the disability or legitimacy of the person, even strangers shall take advantage of the record: Co. Lit. 352; Doctor and Student, 69. Two sue livery as heirs; it is estopped between them, so that one shall not bastardize the other: Br. Ab. Est. pl. 15; and it is there agreed that in all records in which frank tenement comes into dispute it shall be estopped with the land, so that a man may plead it as a party, or as heir, or by *que estate*: Id. In law this is certainly so; but if a legitimate daughter

and her sister, a bastard, join in suing of the livery, this ought not to bar in equity, though it might estop at law: Carter's Rep. 27. An entry by estoppel shall not be awarded in equity, nor is the jury bound to find it; and so the law seems to be in cases of obligations, covenants, and personal contracts; but where the estate is bound by the conclusion, and converted to an interest, though it be found by a jury, yet the court shall judge according to the law that the estate is good by reason of the estoppel: Pollexf. 67. If the heir does not claim the land from him who made the estoppel, but by his own purchase, or by another ancestor, he is not bound by the estoppel: Id. 460.

But here the decree and sale operated on the estate of the intestate, for by a sale made by an administrator by order of a judge of probate or surrogate for the payment of debts, the estate passes to the purchaser by operation of law, so that he is in the estate of the intestate; the land descends, but the interest of the heir is liable to be defeated by a sale made by administrators: *Reed v. Williams*, 7 Wheat. 114; *Buckley v. Pollard*, 20 Johns. 420. One of the reasons why estoppels are allowed is that what once a man has alleged is to be considered true, and he ought not to be permitted to contradict it, as in *Welling et al. v. Brown*, 7 Serg. & R. 407. One with whose privity, and under whose direction, on an execution against him, a marshal's sale was made of an estate as his, shall not be permitted to contradict it; and what is, perhaps, more to the purpose, the doctrine of estoppel has been held with regard to acts in the orphans' courts. The heir at law has been estopped by his acts in this court, from asserting his rights, and thereby converting real into personal property: *Appeal to the supreme court of John Anderson, administrator of Christopher Griffith, deceased*, 4 Yeates, 35. This estoppel is not unconscious, depriving one of his right of inheritance, but it is where one *qua* heir has received the inheritance and conveys it, he shall not be permitted to receive it again, by falsifying the record and denying his heirship, and keep the benefit which he has received in that character.

It is a doctrine of legal policy, forbidding a party to a transaction to deny or falsify it, when he has received a benefit; an estoppel running with and working on the land. If James McPherson is a party to the record, that which he has done so solemnly and deliberately avowed that by means of which he was supported, he shall not be permitted to disturb. Infants are represented by the administrators in these proceedings, as

they are in case of valuation by the guardian, who may accept and bind his infant ward by a recognizance to any amount: *Gelback's appeal*, 8 Serg. & R. 205. Suppose all the children to have refused, and a sale made by an administrator under the order of the orphans' court, which might be, could John then have recovered from such purchaser. But I am anticipating; this falls under another head.

Considering this sale as a proceeding *in rem* to which all those claiming under the intestate are parties, my opinion is that a chancellor would postpone the present plaintiff, and administering justice as we do in this mixed forum of law and equity, that in this action of ejectment, which, with us, in place of a bill in equity, he ought not to recover. At law it would be an estoppel, which chancery never would relieve against, for both law and conscience demand that he should be estopped. And it is the great excellence of a court of equity that it may deny its aid where justice requires it, and lend it on such terms as it may think proper to prescribe; and though I cannot myself discover any solid objection to that conclusion, yet it may seem to others that it is stretching the doctrine of estoppel further than it has yet been done. I put the case on another ground, an impregnable ground; one which will disturb no man's possession where it has been fairly acquired and long enjoyed, and where the defendants have so long reposed in that full faith and credit which the law bestows on all judicial tribunals acting within their proper sphere of jurisdiction, and on decrees under which so many estates are daily conveyed; a ground which, while it unsettles no former decisions, confirms to that most useful tribunal, the orphans' court, the sanction which every court of record holds.

It is enacted by the act of 1713, establishing the orphans' court, that the justices of the peace shall hold and keep a court of record in each county, which shall be styled the orphans' court; and by the constitution the judicial power of the commonwealth is vested in a supreme court, in a court of oyer and terminer, and general jail delivery, in a court of common pleas, and orphans' court, so that this tribunal is not only a court of record, but a constitutional court. By the eighth section of the act of 1713, it is provided that the process to enforce obedience to the warrants, sentences, and orders, concerning any matter or thing cognizable in the said court, shall be by imprisonment and sequestration, as fully as any court of equity may or can do. Appeals lie from their decrees and

sentences to this court; and the orphans' court, in matters within their jurisdiction, proceed on the same principles as a court of equity: *Guier v. Kelly*, 2 Binn. 299. The principle on which I hold the sentence or decree of the orphans' court conclusive is, that it is a general rule of our law that where any matter belongs to the jurisdiction of one court so peculiarly that other courts can only take cognizance of the same subject, incidentally and indirectly, the latter are bound by the sentence of the former, and must give credit to it. This deference is properly shown by those who have not the authority directly, or *ex professo*, but only by accident and collaterally. It would be a great waste of time to refer to the various decisions to support a position so undeniable, and a rule so universal; those who are curious to examine the subject, I refer to Hargrave's Law Tracts, 451.

Such a sentence as the one we are considering is definitive; it passes *in rem judicalem*, the thing is finally judged, not without appeal, for that is given to this court; but we are not reviewing an appeal from this sentence, but as a court of error, the decree of a court of common pleas, which had not a direct cognizance of the subject. It is a proceeding purely *in rem* against the estate of the intestate, and not *in personam*. So much it is a proceeding against his estate that it overrules the lien of a judgment. The estate was condemned to a sale, and may well be compared to a condemnation of goods by a court of exchequer, whose condemnation is final in an action brought to try the right of the goods: *Roberts, Con.*; Bull. N. P. 244; *Scott v. Shearne et al.*, 2 W. Bl. 977. The condemnation divests the property; I mean the title of deceased.

The sentence of a foreign court of admiralty condemning property as prize is received as conclusive evidence not only as to its direct effects, but also as to the fact directly decided by it. It required legislative alteration, and our legislature by act of March 29, 1809, provided "that no sentence, judgment or decree of any court exercising jurisdiction of prize shall be conclusive evidence of any matter, fact or thing therein contained, except of the acts and doings of such tribunals;" but well informed of the mischief of impairing the effect of the sentence on the property condemned, it carefully declares "that nothing contained in the act shall impair or destroy the effect of any such sentence on the property affected, or intended to be affected thereby; but the same shall be and remain as if the act had never been made." The matter which gives the orphans'

court jurisdiction is the death of the owner intestate, for if administration was taken out on the effects of a living man, or of one who died intestate, the administration itself would be void, and there could be no administration to act, no party before the court; consequently all the proceedings would be null. Where an executor obtains payment on a probate of a void will without suit, it cannot be impeached, notwithstanding the probate was afterwards declared null, it being paid on the faith of the act of a judicial tribunal having competent jurisdiction: Tall. Ex. 51. The distinction in this respect is this: a probate of the will of a living person, or a letter of administration on his effects, where the person is dead but left a will, is void, *ipso facto*, because there is no jurisdiction; but where the person is dead, intestate, the orphans' court have power over his estate, and any one acting on the faith of their judicial acts will be protected in obeying them.

The well known distinction between erroneous acts, or judgments of a tribunal having cognizance of the subject-matter, and of a tribunal having none such, is illustrated in *Griffith v. Frazer*, 8 Cranch, 25. This was a case of the sale of real estate on a judgment against an administrator or *durante absentia* of an executor. It was there decided that the sale was void, because the administration was void *ab initio*, and the validity of the sale rested on this, whether the defendant was administrator or not of the debtor; it was ruled he was not, and that being void, all the acts were void; and the chief justice put by way of illustration the case of administration to a living man. This is totally void; it was not within the jurisdiction of the ordinary; it was not committed to him by law; it was a case in which he had no right to deliberate; no one representing the estate was in the case, or before the court; consequently their judgment did not bind that estate. But if there had been a real though erroneous judgment which would justify the sheriff in levying on the land, the sale would have been good; but the execution issued on a judgment that was a nullity. Now, the order of sale would justify the administrators, they would not be wrongdoers in entering and making sale on the premises. These rules would apply more properly and peculiarly to sales by order of the orphans' court than to the various instances to which they have been applied. It is a common and usual mode of sale; fewer sacrifices are made than at sheriff's sales, and they are less expensive, with an equitable power in the court to confirm or reject them as justice may require, proceeding, as

this court always does, on principles of equity. But it never could be imposed as a duty on the purchasers at the end of twenty years to prove the observance of every direction of the acts; as, for instance, who put up the advertisement; it never can be that the title of a fair purchaser should depend on such perishable testimony.

If, and it is the best and fairest guide, it is to be considered, as it would be if the orphans' court were a court of chancery, and had made this decree, and a fair sale had been made, and the decree executed by a conveyance from the administrators, would the purchaser be bound to look beyond the decree if the facts necessary to give the court jurisdiction appear on its face, that is, that there are debts, children to maintain, and not sufficient personal estate for both these purposes. If such a purchaser is not protected, then, as was said by the lord keeper, in *Windham v. Windham*, 3 Ch. 12, where a like attack was made on a sale under a decree of a court of chancery, "you blow up with gunpowder the whole jurisdiction;" and here, if the protection be denied to honest purchasers, you lay a train of gunpowder through the whole state, and this decision would be a signal to set fire to it; for nothing has been more irregular than the practice of these courts generally; there may be exceptions, but they are very rare. These orders depend on loose scraps of paper deposited in untitled pigeon-holes, or packed up as useless lumber in old trunks; and when to this is added, and it is a sore evil, their transmission from hand to hand, as the clerks of these courts are moved off the stage in rapid succession, this would render this species of title so precarious and insecure, that if at the end of thirty years, or perhaps more, the purchaser was bound to produce every inventory, statement or return of sale, no man, no prudent man, would buy at such sales. In some counties, I would not take fifty per cent. to secure the purchasers. Nothing so much requires legislative attention as the proceedings in the orphans' court, for as sure as we descend into our graves, so sure into this court must we come; and the man would be a real public benefactor who would devise set forms, and furnish directions in conducting the vast business in these courts, where we every day find so deplorable a system of confusion.

Whenever the sales are called in question, we find the courts declaring that these irregularities must be overlooked; after a lapse of years, all must be presumed to have been solemnly transacted; presumptions in favor of what does not appear:

Messinger v. Kentner, 4 Binn. 105. The presumption always is that they are regular, and it lies on the party impugning them to show their irregularity. So far even has liberality been carried, that parol evidence was received of a sale which had not been returned: *Rham v. North*, 1 Yeates, 118; and Mr. Justice Yeates, with an experience of fifty years in the business of the orphans' court, and whose knowledge of the mode of conducting it was greater than any one man, living or dead, possessed, in *Snyder's Lessee v. Snyder*, 6 Binn. 496 [6 Am. Dec. 493], exclaims: "What! Shall purchasers be affected by the unskillfulness or negligence of the proper officers?" A substantive compliance only with the act is required. If it appears, on the facts disclosed to the orphans' court, that the debts cannot be paid, and the children brought up, without selling the land, and they are fully satisfied on these points, their power is called into full exercise. The court, in this instance, was fully satisfied of these facts. If the purchaser was responsible for the mistakes of the court in point of fact, after they had judged on the facts, and acted upon them, these sales would be snares for honest men.

Where there are debts, as it is not denied but that there were, the administrators represent the real estate, and the purchaser holds the land sold by order of the orphans' court, discharged of the lien against the judgments against the deceased. The proceedings are always against the administrators to compel a judicial sale, and never against the heir or terre-tenant: 1 Yeates, 238; 1 Peters, 273; 2 Serg. & R. 377; 2 Cranch, 458. The surplus, after discharging the judgments, goes into the administrator's hands; payment to him is good, unless notice be given to the sheriff, and the money ordered to be paid into court. If the order of sale is to be considered as a proceeding in chancery, which I think it is, the petition of the administrator is considered as a bill in chancery, in which, by the act of assembly, he is the sole party representing the estate. It is very important to see how purchasers, under an order of sale by a court of chancery, stand, where sales only can be resorted to for payment to judgment-creditors in default of personal estate. There the heir is the party, the administrator representing the personal estate. A purchaser under the decree is never affected by even a palpable error in the decree, *e. g.*, in not giving day to a judgment-creditor to show cause, or in directing too much to be sold, or in decreeing a sale to satisfy judgment debts, without an account of the personal estate. On

a full examination of the chancery authorities, without going through a tedious detail, this is very much the doctrine and the language of the chancellors. A purchaser is not bound to look into all the circumstances, nor to go through all the proceedings from beginning to end. On the contrary, the general impressions the decisions give, is this: that a purchaser has a right to presume that "the court have taken the necessary steps to investigate the rights of the parties, and that it has on that investigation properly decreed a sale. Then he is to see that all proper parties are before the court; and he is further to see that in taking the conveyance, he takes a title that can not be impeached *aliunde*; and he has no right to call on the court to protect him from a title not at issue in the cause. Although the decree may be erroneous, the title of the purchaser ought not to be affected. And why? Because, as the chancellors say, it would induce great doubts in sales made by the authority of that court, which would be highly mischievous.

This is the present doctrine of the court of chancery, but the principle is not modern. In *Kitely v. Lamb*, 2 Ch. 405, where a bill was filed, praying that a sum of money in the hands of a trustee might be laid out for the benefit of the plaintiff, the bill was dismissed, and the decree of dismissal signed and enrolled, after which the trustees paid the money to the other party who had claimed it. On a bill of revivor, that decree was reversed, yet the court determined that in regard they had relied upon the dismissal signed and enrolled, they were indemnified thereby, and that the plaintiff should be put to seek his money against the person to whom the trustees had paid it, on the ground that whilst the judgment remained in force, it barred the right, and justified the parties, though they paid it voluntarily, and without suit. The purchaser is not bound to see further back than the order of the court; he is not to see whether the court was mistaken in the facts of debts and children; his contract is in truth with the court; and, in fact, we must come to the point, that the purchaser has as little to do with the irregularities of the proceedings as if it had been a sale for a debt of the intestate on a judgment against the administrator by the sheriff holding a *venditioni exponas*, in which case, though the debt has been paid, and nothing was due, still the defendants, or the heirs of the intestate, have no right against the purchaser. A stranger to the proceedings could not be permitted to prove that fact, or if he did prove it, or if

the judgment was reversed for any error, could it affect the purchaser?

Nothing would create a pause in my mind, or hesitancy in my judgment, unless it be the reluctance I should feel in overturning former decisions. I know an impression has prevailed that these irregularities can be inquired into in ejectment, and some *dicta* at *nisi prius* are found in the books to favor that impression. A very eminent judge of the present day has said that he wished there never had been a *nisi prius* case reported; and surely our decisions ought not to be governed by them, unless, by a series of determinations, they have ripened into law; and if they are not supported by law and reason, the convenience of mankind requires that our decisions should not be governed by them. One thing I may venture to assert, without the hazard of contradiction, that there has been no solemn determination by this court, of this very question; I, therefore, consider it as an open one. No sale has ever been declared void in ejectment against a purchaser *bona fide*, for any of the alleged irregularities, or because the decree of the court was founded on a mistake. The case of *Larrimer v. Irwin*, was at *nisi prius*, and the report of that case warns us against confiding in these decisions.

I have a proper respect for judicial decisions where it is clearly ascertained what they are, but where they depend on memory, or such indistinct evidence as to leave it doubtful, they have with me little weight, when they are at variance with the soundest principles of policy and justice. The chief justice cited it in *Messinger v. Kintner*, and as afterwards explained by him in *Huckle and Wife v. Phillips*, 2 Serg. & R. 7, the court did not rely solely on the non-settlement of the accounts, but on the circumstances, particularly on this, that before the purchaser had paid his money, the administrator had settled his account, by which it appeared there was a surplus in his hands after payment of all debts; and Mr. Justice Yeates treats that case with little regard. He says in *Snyder v. Snyder*, 6 Binn. 497 [6 Am. Dec. 403]: "If that decision were that a sale was void, merely because an administration account had not been settled, he could not assent to it. Nineteen out of twenty sales would be rendered void should the doctrine be established." And with strong emphasis he asserts "that the decree of an orphans' court, in a case within its jurisdiction is reversible on appeal, and not collaterally in another suit." In *Messinger v. Kintner*, the court did inquire into the proceedings

of the orphans' court, because there they considered the decree a nullity on its face. It purported to be the partition and valuation of a man's land; it was a proceeding against his estate, and the estate of his father, in which he was alleged to be bound by proceedings unsanctioned by law or justice, where neither he nor his guardian, or next friend, was a party; it was all *coram non judice*, and tainted with fraud, which vitiates the most solemn acts. I do not quarrel with this decision—it does not come in my way.

When the decree in *Fullerton's case*, at *nisi prius*, at Chambersburg, was assailed on the ground that there were only debts, and no younger children, it was sustained: 4 Dall. 451, 4 Yeates, 523, and in *Rham v. North*, before Yeates and Smith, justices at *nisi prius* at Harrisburg, where the order required no return of sale, and none was made, a sale proved by parol was supported; and so in *Huckle and wife v. Phillips*, 2 Serg. & R. 4, a decree of sale on the ground of maintenance of a child only, was held good, although there were former sales for payment of debts; and in *Bickle v. Young*, 3 Serg. & R. 234, where the whole proceedings and sale were conducted in the name of one administrator only, when there were two; and in *Snyder v. Snyder* the same objection was made and did not prevail. These are all the reported cases, and yet the purchaser has been hitherto protected, except in *Larrimer v. Irwin*, the circumstances of which are not stated. In the case of *Davis v. Huston*, 2 Yeates, 289, the lands of the intestate had been valued under a decree of the orphans' court, and taken at the valuation by a putative daughter and sold by her, and the purchaser set up her illegitimacy as a defense against the payment of the purchase-money, and this defense prevailed.

There was in *Messinger v. Kintner*, a proceeding against the estate of the heir, and not of the ancestor, and in fact it was a controversy between the legitimate and illegitimate child, and against such estoppel, we have seen from Carter's reports, equity would relieve. It is true that the chief justice, in *Snyder v. Snyder*, spoke of a long practice of inquiring into these proceedings in actions of ejectment, acknowledging its inconvenience. So far as these irregularities go to show a fraud, or to corroborate other proof of a fraud, I agree. Mr. Justice Yeates took a view of the subject which meets my assent and approbation, and I can not give his conclusion better than in his own words: "I consider the general remark to be correct, that the decrees of the orphans' court, in a case within their jurisdiction, is reversible

only on appeal, and not collaterally in another suit. The settled rule is that the merits of a judgment can never be contested in an original suit either in law or in equity: 2 Burr. 1009. The maxim is *de fide et officio judicis non recipitur questio*: Hard. 127. The defendant in error in *Messinger v. Cunliff*, a minor, somewhere about nine years of age, was attempted to be bound by proceedings unsanctioned by law and justice, to which neither he nor his guardian, nor his next friend, were parties; it was *res inter alios acta*, and no presumption could be made in favor of what was done. I assimilate the present case to a sheriff's selling land which he has taken in execution by process of law. The judgment concludes all irregularities in the previous proceedings, except where the plaintiff in the execution becomes the purchaser: *Goodyer v. Jance*, Yelv. 79; but the sale must be fair and just, uninfluenced by threats or violence. Here the lands have not been aliened by the first purchaser, but remain in his children, whose guardians have leased to the defendant. The true merits of the case rest on the honesty and fairness of the public sale, and may be fully contested in the present suit:" 6 Binn. 499.

It gives me additional confidence in the opinion I have formed to find the chief justice in considering the question again in *Selin v. Snyder*, 7 Serg. & R. 166, which was the same as *Snyder v. Snyder*, new parties being added, declaring, "that the orphans' court were acting within their jurisdiction. They had power to receive and grant the order for the sale of John Snyder's estate, and, therefore, what is averred on the record cannot be contradicted. The sale may be avoided if unfairly made, but the assertion in the record, that the parties appeared in court, must be taken to be an absolute verity." "The purchaser is bound to look to the jurisdiction of the orphans' court, and, in some instances, the validity of the proceedings has been contested in the courts of common law; but the truth of the records concerning matters within their jurisdiction cannot be disputed." And again, in the supreme court of Philadelphia, in December last, in *Kennedy v. Wachsmuth*, he repeated this well-settled principle. The court has here decided that there were debts, and children to support, and no personal estate to pay the debts and support the children, and on that state of adjudged facts they decree a sale. Beyond the decree, the purchaser is not bound to look. The inquiries upon ejectment are: Was there an administrator and order to sell, such as would authorize the administrator to make sales; was the sale fair?

The irregularities or mistake of facts after sale confirmed, money paid, conveyance executed, possession for twenty years, improvements of twenty times the value of the property, fair purchasers deriving title by subsequent conveyances, cannot affect the purchasers. These objections, on the return of the sale, might and probably would have been sustained by the orphans' court; but these and all other errors noticed by the counsel of the plaintiff in error, ought not to overturn these fair and honest proceedings and sales. I have not concluded it necessary to go into detail on the various errors assigned. The present opinion, in its general scope, embraces the whole of them, and though there may be some abstract opinions of the court to which I cannot accede, yet, as in the main the charge is right, there can be no reason for reversing the judgment. If there were irregularities as to the advertisement, that was error of judgment of the administrators; where there was no fraud intended, and where the proceedings were intended to be fair and regular, they ought not, after the confirmation by the orphans' court, and so long an acquiescence, to be overthrown to the injury of subsequent *bona fide* purchasers. It was insisted that whatever might be the fate of the first sale, the second was clearly void. I cannot distinguish them. The act of 1794, under which they were made, provides that the orphans' court may, from time to time, order sales for payment of debts, maintaining the children, and improving the residue. The purpose is joint; if the first does not produce a sufficient sum for all purposes, the order may be renewed until all the purposes are satisfied. All will be considered as one transaction; and this was decided in *Huckle and Wife v. Phillips*.

The doctrine I advance is that where there is a direct sentence on the very point, such is to be received as conclusive evidence not to be impeached from within, but like all other acts of the highest judicial authority is impeachable from without; and though it is not permitted to show that the court was mistaken in the original action, it may be shown that they were misled by some collusive action between the parties, and this was decidedly the opinion of all the judges in England in the *Duchess of Kingston's trial* in the house of lords, 9 State Trials, 268. Collusion being a matter extrinsic of the cause may be gone into by a stranger, and tried by a jury. It might be here inquired into whether there was collusion between the administrators and the first purchasers in obtaining this decree; but that is not pretended. There is a common mistake of all, at least of one

of the administrators, of the court, and of the purchasers—a mistake arising out of an unknown fact which took place in a foreign country. A man is chargeable with goods sold to a woman, whom he represents as his wife, though they are not in fact married.

One more authority I add, *Canaan v. Greenwoods Turnpike Co.*, 1 Conn. 1, 7, Trumbull, J., in delivering the opinion of the court said, “a judgment, decree, sentence or order passed by a competent jurisdiction, which creates or changes a title or any interest in the estate, real or personal, or which settles and determines a contested right, or fixes a duty, belongs to the party in whom the court adjudged it.” The orphans’ court had authority to direct the administrators to mortgage for payment of debts, and support the children, not exceeding one third the value of the estate. Now, if instead of a sale, money had been taken upon mortgage fairly applied by the administrators, could it be endured that the mortgagee should lose the money advanced on the faith of a decree to which all are bound to give credit, because it afterwards turned out in point of fact that the intestate had a wife in Ireland, and his children were illegitimate, and that though there were debts to pay of the intestate? No honest and intelligent man, lawyer or layman, could hesitate to give an answer; that answer would be, justice forbids this. If it were not that some former decisions, at *nisi prius*, had mutilated the uniformity of the law relating to decrees for sales, sales executed and conformed by the court would be sustained, according to the universal rule governing the sentences of every court of record when acting within its jurisdiction. The determination of this court in the recent case of *Selin v. Snyder*, has restored the law by declaring that testimony shall not be received to contradict the record. The error assigned was not a mere formality, but a vital objection, a charge that the proceedings were conducted against the consent of the administratrix, the mother of the children of John Snyder.

It is impossible to distinguish; the cases in principle are the same, for if it were permitted to falsify *in uno*, it would be permitted to falsify *in omnibus*. The strongest possible case is that cited in 10 Vin. tit. Record C, pl. 2, from Br. E, pl. 78: “Record of outlawry of divers persons was certified in the exchequer, among whom one was certified outlawed, and was not outlawed, and that his goods forfeited were in the hands of I. N., and upon process made against him, he came and said he was not outlawed; and parcel of the record came by chancery out of

B. R. into the exchequer; and Green, Justice of B. R., came into the exchequer and said he was not outlawed, but that it was misprision of the clerk. Skipwith said that though all the justices would record the contrary, they shall not be credited where we have recorded that he is outlawed. *Quere*: What remedy is for the party? It seems it is by writ of error, inasmuch as there is no original against him, but only record of outlawry without original: Br. Record, pl. 49. And in the same book, pl. 4, cites Br. Err., pl. 78, it is said the diversity is this, that a man may assign error on a thing separate or out of the record, but he cannot falsify it." The decision in *Selin v. Snyder* impresses the decree with the seal of inviolability, where a fair and *bona fide* purchaser claims under it, where it was a duty for the court to decree, and where the decree states such facts as give the court authority to make the order of sale.

Cases of individual hardship may arise from adhering to this principle, but the old maxim of law is that a private mischief shall be rather suffered than a public inconvenience; and this is applied to all public sanctions in government and legislation, and it never can be more safely applied than to the sanction of judicial sales; and if these purchases are not protected, but remain open to inquiries as to the regularity and exactness of the proceedings of this tribunal, this useful power will be disused, and in time abolished. I have stated what I conceive to be the legal and fundamental rules of property, and if the question was to be decided by appeal to plain, common sense, its verdict would be the same as the judgment of the law. On the view I have taken of this case, I have not thought it necessary to dwell much on the minor objections; they are absorbed in the great question; the final decision of the cause rests on that, and it is of consequence it should so rest. All others sink into insignificance, but the great question of the conclusiveness of these decrees for sale by order of the orphans' court required an unequivocal determination. It is one on which the title to so many estates depends, that it could not, without great mischief and inconvenience, be postponed, and it would be unworthy to evade it; it is on that ground also I wish to be distinctly understood that the judgment is affirmed. I consider the rule as one of the indelible landmarks of property, invariably established by the well weighted policy of the law, and has stood the test of ages, founded on the great principle of public convenience and necessity, and ought not to be shaken

by any incidental mischief to an individual, which occasionally will occur to an individual from every general rule.

This, like other general principles, may produce disadvantages unjustly to an individual, but it is on this condition that general rules are adopted; partial inconvenience is the inevitable consequence, but the production of general good authorizes the establishment; "partial evil is universal good." But the hardship, if considerations of hardship ought ever to mingle in the administration of justice, would fall on the defendants. The Irish heirs never dreamed of this inheritance; it was to them totally unexpected; they never calculated, or acted upon it as a right which might descend on them; it was a mere windfall, as little looked for as the descent of the imperial crown on their heads, and as much a surprise; to them it would be no disappointment. But the defendants have laid out the labor of their lives upon it, have looked up to it as their support during life, and a provision for their children on their death; they have considered it as their own; all the plans and habits of life have been formed in the full belief of enjoying that which they had fairly acquired on the faith of a judgment of a court having authority. And as it respects the present plaintiff, what grievance has he to complain of, except the baffled expectation of an iniquitous speculation, and except that he has not suffered to sell the very hands that fed him, and is disappointed in the premium he expected from stigmatizing publicly his mother, and defiling his own nest? It maintained and educated him; it supported his mother and sister; and the reserved part of the lot rendered valuable by the money of the defendants, he still enjoys; he holds the worth of his money. One thing is very plain, that either the real value was concealed from the Irish heirs, or that they, from a sense of justice to the purchasers, or humanity to the plaintiff, parted with it for its value as it stood at the death of the intestate. If the state of improvements had been communicated to them, then they conveyed to him as the natural heir, or as trustee for the purchasers. Considerations of hardship are of little value; courts of equity do not sit to inquire how the loss of property may press on the individual, or that who has held it without title. The usual subject of consideration for the court is, whether it has been held without title; and if they find that it has, to restore it without delay to the right owner. There is nothing of conscience in his claim, and the law is against him.

This opinion I have formed after long and repeated consid-

eration. I have explained the ground of it, I fear, with too much prolixity, and perhaps have repeated too often the same thing; but public duty required a deep investigation and full explanation of the subject. The justice of the case is so clearly with the defendants that it would be incumbent on the plaintiff, who wishes to establish a rule contrary to justice and equity, to produce some well-established authority, showing that there is an inflexible rule of law in opposition to justice. He has failed to do this, for the invariable rules of law, and the justice and equity of the particular case are in exact and happy conformity. Judgment affirmed.

Since the opinion was drawn up, I find in volume 1 of the reports of Nott and McCord, of the cases of the constitutional court of South Carolina, 329, that the decree of the court of ordinary, revoking the probate of a will, was held to be the judicial act of a court possessing jurisdiction over the subject-matter of dispute. And the law holds the exercise of this right so sacred that no evidence will be permitted to contradict it in relation to the subject in dispute, so long as it remains unreversed by the superior tribunal; and this can only be done by appeal to the common pleas, according to the act of assembly. And in *Waters v. Woodward*, same page, an existing judgment or decree of a chancery court, upon a matter within its jurisdiction is conclusive of the right of the parties in any other court of concurrent jurisdiction; nor do the decrees of a court of equity form any exception to the general rule. Sitting in a court of law judges are not at liberty to enter into the examination of the justice or injustice of the decree of a court of competent jurisdiction. Unless it comes before them on a writ of error or appeal, it must stand reversed by a court of competent authority to review it. In *Scott v. Hancock*, 13 Mass. 162, under a similar proceeding, Jackson, J., said: "These orders of sale by administrators affect the inheritance; and if we should decide these questions conclusively against the heirs, who should be disinherited to the extent of what should be sold under the order, without any trial of the fact by a jury, and without any opportunity of reviewing the judgment by writ of review, writ of error, or in any other manner." The claim of the creditors is paramount to any title that could be acquired after the death of the testator. And in *Moers v. White*, 6 Johns. Ch. 384, Chancellor Kent entirely approves of this doctrine of the conclusiveness of the order of sale, and refers to *Read v. Williams*, 7 Wheat. 60, before cited, and observes

that the validity of the order of sale was not questioned, because it was the order of a competent court of peculiar and exclusive jurisdiction; and it was an extraordinary and monstrous case. Letters of administration were granted after the lapse of twenty-eight years, and the right to sell after the lapse of thirty-one years from the death of the intestate yet the decree of the court being *res judicata*, it could not be questioned in a collateral action. Thus we see how the question stands by the law of England, and our sister states, New York, Connecticut, Massachusetts and South Carolina. The extent of real property that must be transmitted in the course of twenty years by this mode of sale is immense, and the number of persons through whom that property passes is inconceivable. Can it be, then, that a matter decided by the orphans' court, a court of peculiar jurisdiction, shall be controverted at the end of any given period, and that a latent claim, which no man of intelligence could foresee, known to no one, or if known, concealed, should be put in operation by an heir and sweep away the labor of a life-time; and that because the tribunal appointed to decide had erroneously found a fact on *prima facie* evidence, as the cohabitation here was, and then without notice, or the means of notice, the decree of the court should be disputed after such long possession?

As the doctrine of the law, I hope I have satisfactorily shown it shall not.

TILGHMAN, C. J., was absent, in consequence of sickness.

CONCLUSIVENESS OF PROCEEDINGS IN ORPHANS' COURT IN PENNSYLVANIA.—The doctrine, here for the first time distinctly laid down in Pennsylvania, that the orphans' court is a court of record of equal dignity with the common law tribunals, and that its decrees as to matters within its jurisdiction are conclusive upon parties and privies against all collateral attack and impeachment, except for fraud, has been steadily adhered to by the courts of that state ever since, and became by the act of March 29, 1832, a part of the statute law of the commonwealth. That act provided that the decrees of this court "in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court." In *Beeson v. Beeson*, 9 Pa. St. 294, the court say: "The quality of conclusiveness first happily applied by *McPherson v. Cuntiff*, 11 Serg. & R. 422, has been since steadily adhered to till finally sanctioned by statutory enactment. The principal case is cited and approved on this point in *Groff v. Groff*, 14 Serg. & R. 184; *Fox v. Winters*, 4 Rawle, 176; *Snyder v. Markel*, 8 Watts, 418; *Bolton v. Hamilton*, 2 Watts & S. 276; *Clay v. Irvine*, 4 Id. 236; *Herr v. Herr*, 5 Pa. St. 431; *Mitchell v. Kintzer*, Id. 218; *Painter v. Henderson*, 7 Id. 52; *Merklein v. Trapnell*, 34 Id. 47; *Horner v. Hasbrouck*, 41 Id. 178; *Dixey v. Laning*, 49 Id. 146; *Torrance v. Torrance*, 53 Id. 510; *Musselman's appeal*, 65 Id. 485. Judge Agnew, in the case last

cited, reviews the history of the orphans' court in Pennsylvania, and says: "It was not until the able and exhaustive opinion of Judge Duncan delivered in 1824, in *McPherson v. Cunliff*, 11 Serg. & R. 422, which settled the proper position of the orphans' court, that it reached its true dignity, and the way was prepared for the revision of the orphans' court system, its jurisdiction, powers and practice, contained in the acts of twenty-ninth of March, 1832, twenty-fourth of February, 1834, and sixteenth of June, 1836. Under these laws the orphans' court came up to the full measure of a court of record, standing upon an equality with the others."

Without the aid of the doctrine that the decrees, orders and proceedings of such courts, with respect to matters within their jurisdiction, are impervious to collateral attack, it would have been impossible to sustain the sale in the principal case, for there seems to have been an entire departure from the directions of the statute as to the evidence upon which the court should act in ordering a sale of realty. This is very clearly shown in *Snyder v. Markel*, 8 Watts, 418, by Kennedy, J., in delivering the opinion, where he says: "The orphans' court is a court of record in this state, and has a very general and, indeed, exclusive jurisdiction over the estates of deceased persons, and can by no means be considered a court of inferior jurisdiction and therefore bound to observe and adhere to the letter of the statute, in all its judicial proceedings, or otherwise the judgments or decrees made therein, will be considered *coram non iudice*. Mr. Justice Duncan, in delivering the opinion of this court in *McPherson v. Cunliff*, 11 Serg. & R. 429, in order to show that the sentence or decree of the orphans' court is conclusive, applies to it, the general rule of our law, 'that where any matter belongs to the jurisdiction of one court so peculiarly that other courts can only take cognizance of the same subject, incidentally and indirectly, the latter are bound by the sentence of the former, and must give credit to it.' Had it not been for the principle of this rule, and the application of it to that case, it would have been difficult, if not impossible, to have sustained the decree of the orphans' court, and the sale of the property, in question in that case, made under it. It was made under the authority of the nineteenth and twentieth sections of the act of the nineteenth of April, 1794. * * * Although the act of 1794, in order to authorize the orphans' court to decree a sale, required that there should be lawful issue of the deceased in their minority, an appraisement of the personal estate and an account upon oath or affirmation of all the intestate's debts exhibited, yet the sale was decreed in *McPherson v. Cunliff* without any of those things having existed or been done, and held good. *McPherson v. Cunliff*, as well as many other cases, establishes beyond all controversy that it is not the kind of proof directed to be given by the act of assembly to the court, for the purpose of showing that according to its provisions there ought to be a sale of either a part or the whole of the real estate, which gives the court jurisdiction over the subject and makes the decree binding, and the sale under it valid. It is a proceeding *in rem*, and it seems to be the condition of the estate which brings it within the jurisdiction of the court." It was accordingly held that under the act of 1811, also, a sale would be conclusive against collateral attack, although ordered without any settlement of a final administration account, which was required by the statute, but merely upon a sworn list of assets and debts unpaid. ●

But it is held that this doctrine of the conclusiveness of the decrees of such courts will not be allowed to protect them from collateral attack where they are tainted with fraud. Says Coulter, J., in *Mitchell v. Kintzer*, 5 Pa. St. 218: "The great case of *McPherson v. Cunliff*, 11 Serg. & R. 422, which

the counsel for the plaintiff in error cited to establish, that the decree of the orphans' court was absolute, and conferred title beyond and above impeachment of any kind, does not maintain their position. I yield willing reverence to the great mind which first shed forth the light on that subject, which was afterwards concentrated and embodied in the act of assembly of 1832, relating to orphans' courts, and by which their decrees were made of the like force and efficacy as the judgments of common law courts. In delivering the opinion of the court in that case, Judge Duncan says: 'The doctrine I advance is that where there is a direct sentence or decree on the very point, it is to be considered as conclusive evidence, not to be impeached from within, but like all other acts of the highest judicial authority, to be impeached from without.' And he says again: 'Where there was no fraud intended, and where the proceedings were intended to be fair, they ought not, after confirmation by the orphans' court, to be overturned.' Thus the principle is admitted by that learned judge, that the decree may be impeached for fraud."

Nor does this doctrine apply where the court has not taken the steps necessary to acquire jurisdiction. Want of jurisdiction is as fatal to a decree of an orphans' court, as to the judgment of any other court: *Torrance v. Torrance*, 53 Pa. St. 510. In that case it was held that where an executor procured an order for the sale of property for the payment of legacies charged upon land, when the statute did not authorize it, the proceeding was *coram non jndice*, and void.

EQUITABLE ESTOPPEL.—The doctrines advanced in the principal case on this subject, are approved in *Wilson v. Bigger*, 7 Watts & S. 125; *Commonwealth v. Shuman*, 18 Pa. St. 346; *Spragg v. Shriver*, 25 Id. 286; *Maple v. Kussart*, 53 Id. 353; *Williard v. Williard*, 56 Id. 128.

HUNT v. BREADING.

[12 SERGEANT & RAWLE, 37.]

JUDGMENT, SATISFACTION BY LEVY.—When the plaintiff has seized goods sufficient to satisfy his judgment, it is thereby discharged. The goods cannot be released and the judgment revived to the prejudice of subsequent judgment-creditors.

ERROR to the common pleas in an amicable action to try the rights of the parties to a sum of money in court, arising from the sale of the real estate of Caruthers. A case was stated for the opinion of the court, to be considered as a special verdict, either party having a right to sue out a writ of error. The opinion of the court of common pleas being in favor of the defendant, the cause was removed, by writ of error, to this court. The facts are stated in the opinion.

Lyon, for the plaintiffs.

Kennedy and Ewing, for the defendants, were stopped by the court.

By Court, GIBSON, J. When the agreement, which gives rise to this controversy, was entered into, the interests of all the parties who had liens stood thus: Dales had obtained a judgment against Caruthers on the seventeenth of July, 1817. Bayless and Thornton had obtained a judgment against Gregg and Caruthers on the twenty-fifth of February, 1820. Breading, the present defendant, had obtained a judgment against Caruthers on the eighth of March, 1820, and E. and C. Hunt, the present plaintiffs, had obtained two judgments against Gregg and Caruthers, the one on the eleventh of March, and the other on the eighth of December, 1820. These judgments were liens on the lands of Caruthers in the order of priority in which I have mentioned them. Bayless and Thornton had issued a *fiery facias* on their judgment, and had seized the partnership effects of Gregg & Caruthers in execution, but at the same time permitted those effects to remain in the custody of the latter, as appears by the sheriff's return. While matters are in this state, an agreement is entered into between the Messrs. Hunt, Bayless, the partner of Thornton, and Gregg, the partner of Caruthers, by which it is stipulated that the levy under the execution of Bayless and Thornton shall be set aside; that their judgment shall be assigned to the Messrs. Hunt, who engage to pay them their debt; and that the goods of Gregg & Caruthers, which were thus to be released from execution, shall be delivered to the Messrs. Hunt in payment of the demand which they had in their own right. This agreement is afterwards carried into execution, and the land of Caruthers being subsequently sold on the judgment of Dales, it is contended that the judgment of Bayless and Thornton, in the hands of the Messrs. Hunt, ought to be treated as still outstanding, and as a lien entitled to a priority over the judgment of Breading.

It is unnecessary to consider the effect of the rule in equity which compels a creditor who has a security on two funds to take his satisfaction out of a particular one of them, in favor of a creditor who has a security exclusively on the other, as I am satisfied, on principles of law, that a judgment-creditor who has seized the goods of his debtor in execution, cannot discharge them, and leave his judgment in force as to the land. But there are particular circumstances in the case stated which render it a peculiar one, and which it is worth while to consider. A judgment-creditor who has seized the goods of his debtor, agrees to set aside his levy, and assign his judgment to subsequent judgment-creditors, on receiving the amount of his debt from them;

while they, on the other hand, receive from the debtor, in payment, as it is said, of the debts originally due them, the very goods which had been levied in satisfaction of the judgment which is assigned to them; and all this circuitry of what is in effect, payment of that judgment to elude an intermediate judgment, which is a lien on the land. To their own rights the plaintiffs unite in their own persons, the rights of Bayless and Thornton, and it is immaterial to the argument whether all those rights are united to the persons of the plaintiffs, or in the persons of Bayless and Thornton, the incidents of ownership, as to this particular judgment, would be exactly the same.

If, then, Bayless and Thornton had become assignees of the two judgments of the plaintiffs, could they have released the goods of Gregg and Caruthers, which had been seized in execution on their prior judgment, and at the same instant have received those goods directly in payment of their subsequent judgments, so as to reserve the first as a lien on the land? No one will pretend it. That would put it in their power to lock up the goods of the debtor, under an execution on their prior judgment, till matters should be in train to seize the same goods in execution for another debt, and thus, by changing the application of their levy, enable them to obtain a preference, as regards both the real and the personal estate; but it is said that consequence could not have been produced in this instance, because the goods were left in possession of the debtor, and there was no obstruction to a levy by subsequent execution-creditors. I admit it; but it is impossible not to see that the whole arrangement was intended to produce payment in effect of the judgment of Bayless and Thornton, and at the same time to give the judgments of the Messrs. Hunt a priority over the judgment of Breading, at least, to the value of the goods, and that such an arrangement would be fraudulent in the contemplation of law, I am very much inclined to believe.

But the cause is clearly with the defendant on another ground. Seizing goods in execution to the value of the debt, is a discharge of all responsibility on the part of the debtor, and, consequently, a discharge of the judgment, and this, whether the goods be sold or not; all further remedy being against the sheriff, who becomes exclusively liable by the seizure: *Clerk v. Milners*, 1 Salk. 323; *Mountney v. Andrews*, Cro. Eliz. 235; *Glie v. Finch*, 2 Roll. 57; *Cockrant v. Welby*, 2 Show. 79, pl. 63; *Speake v. Richards*, Hob. 206; 4 Mod. 404. Where, indeed, the sheriff has seized on a *fi. fa.*, but returns

nulla bona, and there is a recovery against him by the judgment-creditor for a false return, the fact of actual seizure will not discharge the judgment, but the property in the goods will remain in the debtor, subject to any other execution: *Underwood v. Mordaunt*, 2 Vern. 238. But this consequence, I apprehend, is produced by the conclusiveness of the return, which is of such high regard, that, generally, no averment is to be received against it, and it cannot, therefore, be shown that the goods were actually seized: Com. Dig., Return G.

In *Ward v. Hanchett*, 1 Keble, 551, it was determined that where the sheriff takes a bond for the money, it is payment of the debt as to the judgment-creditor, and, further, that if he seizes the goods and leaves them in the possession of the debtor, by the direction of the judgment-creditor, and under an agreement with the creditor, it is in strictness satisfaction of the judgment; and, although the court would not, in that case, compel the sheriff to return the execution, to enable the party to have an *audita querela*, yet, it was said, that if he had suffered damage on account of the writ not having been returned, he might maintain an action for it. The sum of the matter, therefore, appears to be this: Where the goods are actually seized, the property vests in the sheriff, and the debt becomes satisfied, as to the judgment-creditor, who can only look to the sheriff, unless where the latter chooses to return *nulla bona*, and there he becomes answerable to the judgment-creditor for his false return, who may also levy the same goods on another execution. Here the sheriff returned that he had levied and left the goods in the possession of the debtor, and the judgment must, therefore, be treated as having been at one time actually satisfied. Whether it might not be restored to its former incidents, by the agreement of the parties, as between themselves, is not the question; assuredly it could not be restored so as to deprive third persons of an advantage which they had gained, by its having at any period been discharged, consequently, its lien on the land is gone.

Judgment affirmed.

This case is cited in *Betz's appeal*, 1 Penn. 278, as establishing the principle that a judgment-creditor who has seized the goods of his debtor in execution, cannot discharge them, and leave his judgment in force as to the land; in *Whitehill v. Wilson*, 3 Penn. 415, as deciding that seizing the goods of the debtor in execution is *ipso facto* satisfaction; in *Coleman v. Mansfield*, 1 Miles, 58; *Boas v. Updegrave*, 5 Pa. St. 519; *Frakey v. Steinmetz*, 22 Id. 92; and *Spang v. Commonwealth*, 5 Id. 359, as authority for stating that seizing goods is a discharge whether the goods were sold or not: *Wood v. Vanarsdale*, 3

Law. 403, was decided to come within the principle of this case. In *Cathcart's appeal*, 13 Pa. St. 422, and in *Lyon v. Hampton*, 20 Id. 49, it is cited as deciding that one who has levied cannot afterwards divert the levy to the detriment of another who had obtained an advantage by its having been satisfied. In *Taylor's appeal*, 1 Pa. St. 393, Gibson, C. J., says: "No more was determined in *Hunt v. Breeding*, than that an execution-creditor, whose levy has kept others at bay, shall not abandon it and assign his judgment for the consideration of payment as an existing lien on the debtor's land." In *Campbell's appeal*, 32 Pa. St. 92, Bell, J., calls *Hunt v. Breeding* an exceptional case, and says that it does not go the length which seems to be supposed. In *Bank of Penn. v. Winger*, 1 Raw. 302, the court decide that it is not an authority on the point on which the counsel in that case cite it.

WATSON v. BLAINE.

[12 SHERBURN & RAWLE, 181.]

WRITTEN INSTRUMENTS MUST BE CONSTRUED BY THE COURT, except when they cannot be understood without reference to facts *dehors* the writing, in which case the jury, who are to inquire into the facts, should judge of the whole.

WRITTEN INSTRUMENTS, HOW CONSTRUED.—In construing an instrument in writing, the whole must be considered; obscure parts may be explained by the parts which are clear; and the strict rules of grammar will not control a writing made by men who are not grammarians.

AN ACKNOWLEDGMENT OF PAYMENT contained in an agreement for the conveyance of land, while admissible, is not conclusive evidence of payment.

PARTIES PLAINTIFF.—An action to recover damages for the breach of a covenant for the conveyance of land must be brought by the administrator, and not by the heir.

ERROR to the court of common pleas, accompanied by bills of exceptions to the evidence, and errors assigned in the charge of the court below. The facts are stated in the opinion.

Mahon and Carothers, for the plaintiff in error, contended that it is a settled principle that the construction of written instruments, especially of those under seal, belongs exclusively to the court, and that the common pleas erred in submitting it to the jury. The chief justice, in *Welsh v. Duser*, 3 Binn. 337, insists on the importance of preserving this principle intact. This court reversed the judgment of the court below in *Moore v. Miller*, 4 S. & R. 279, because it left the construction of an award of arbitrators to the jury. If a paper speaks for itself it must be construed *ex visceribus suis*: *N. Y. Corporation v. Cashman*, 10 Johns. 96; 1 Phill. Ev. 416, 473; *Storer v. Freeman*, 6 Mass. R. 440. The whole tenor of the agreement shows that the acknowledgment of the payment of the purchase-

money was restricted to the tract of two hundred and nineteen acres, seventy-six perches. The agreement must be considered as a whole, and ought not to be tested by nice grammatical criticism. The first agreement was for the sale of eight hundred and thirty-two acres, seventy-two perches, and no conveyance was to be executed until the whole of the purchase-money was paid. The second agreement was not intended to destroy any part of the first, but to provide for the two hundred and nineteen acres, seventy-six perches, paid for by Davis. He could not reasonably expect a conveyance of more, and, therefore, a cash payment for that quantity must be understood from the agreement, and not a payment in bonds for the whole of the tract of eight hundred and thirty-two acres, seventy-two perches. The certificate contains an express acknowledgment by Blaine that he had received payment for the quantity of land that he stipulated to convey, and this he is estopped from denying: *Peake et al. v. United States*, 9 Cranch, 33; *Skelley v. Wright*, Willes, R. 9; 3 Burr. 637. The court erred in stating to the jury that the lapse of time before the commencement of this suit was a circumstance of great weight against the plaintiff's right of recovery. The legal presumption created by lapse of time did not exist in this case. The instruction was, therefore, erroneous in point of law; it was not a mere opinion on a question of fact. It was manifest error to state to the jury that this action ought to have been brought by the heir, and not by the administrator: 1. As Blaine never conveyed to Davis, there was no covenant real which could run with the land. In England the heir could not maintain an action on this covenant. A covenant real is annexed to the land, and must accompany the legal title, which Davis never held: 1 Brown's Ch. 364; 4 Cruise, 67; 1 Esp. N. P. 152; *Spencer's case*, 5 Rep. 16; *Greenby v. Wilcocks*, 2 Johns. 1; *Hamilton v. Wilson*, 4 Id. 72; *Moody v. Vandyke*, 4 Binn. 41; *Hawn v. Norris*, 4 Id. 77; 2. The covenant, if real, was broken in the life-time of Davis; 3. In Pennsylvania, the administrator only could sue, whether the breach was in the life-time of the intestate or not. Here lands are assets for the payment of debts. The policy of the law would be defeated if the heir could sue for damages, and divert them into another channel. By giving the right of action to the administrator, justice is done to all; for whatever is left, after the payment of the debts, goes to the heir: *Graff v. Smith's Executors*, 1 Dall. 481; *Morris's Lessee v. Smith*, 1 Yeates, 238; 4 Dall. 209; *Wooltering v. Stewart's Executors*, 2 Yeates, 483; *Mc-*

Pherson v. Cunliffe, 11 S. & R. 422; *Wilson v. Watson*, 1 Pet. 273; *Telfair v. Stead's Executors*, 2 Cranch, 407; 13 Mass. 162.

Alexander & Melsger, for the defendants in error, contended that Blaine was not bound by the first agreement to convey to Davis until payment of the whole purchase-money of the eight hundred and thirty-two acres, seventy-two perches, was made. The object of the second agreement was to do away with the first, except as to the conveyance of the two hundred and nineteen acres, seventy-six perches, and the terms of payment as to the smaller quantity were to be the same as for the larger quantity in the first agreement. It bears evidence of being loosely drawn, and contains several mistakes; it ought, therefore, to be liberally interpreted. The court ought to have construed it in our favor. It was proper to receive evidence to show whether or not the money had been actually paid: 18 Johns. 420; *Heilner v. Imbrie*, 6 S. & R. 410; 6 Binn. 345; 2 Coke, 74; 2 Burr. 2785-7; 2 Cruise, 428; Cro. Jac. 512; *McDermot v. United States Ins. Co.*, 3 S. & R. 607; 1 Yeates, 138; 2 Dall. 174; *Hamilton v. McGuire*, 3 S. & R. 355; *O'Neill v. Large*, 3 Harr. & McHen. 433; *Jordan v. Cooper*, 3 S. & R. 564; *Bowen v. Bell*, 20 Johns. 341; *Miller v. Heller*, 7 S. & R. 36. The court properly referred the construction of the second agreement to the jury, because there were many extrinsic facts to be considered, and where this is the case, the jury are to judge of the whole: *White v. Kyle*, 1 S. & R. 520; 2 Id. 8; 8 Id. 150; 4 Cranch, 71; *Dennison's Executors v. Werts*, 7 S. & R. 372. The length of time that elapsed before suit was a strong presumption against the plaintiff's right of recovery. But even if the court was wrong the error was a mere opinion on a matter of fact, in which error cannot be assigned. The personal representative cannot maintain this action. Damages, if recovered, belong to the heir. No breach of the agreement took place in the life-time of Davis, since he died in the possession and enjoyment of the property. The rule here is the same as in England. If the breach takes place in the life-time of the ancestor, the right of action belongs to the executor; if after his death, to the heir: 1 Chit. on Pl. 14; Sug. on Vend. 367; *Van Rensselaer v. Platner's Executors*, 2 Johns. Ca. 24; *Hamilton v. Wilson*, 4 Johns. 72.

By Court, TILGHMAN, C. J. This is an action of covenant, by the administrator of John Davis, deceased, against the executors of Ephraim Blaine, deceased, on a writing under hand and

seal, executed by the said Blaine on the sixth of June, 1783. The first question which arose on the trial of the cause, was whether the court was bound to give the construction of the writing, and if so, what was its meaning? It is a general rule that the court, and not the jury, are to judge of the meaning of a written instrument, except in certain cases, where the instrument is not to be understood without reference to facts *dehors* the writing, and then it may be proper that the jury, who are to inquire into the facts, should judge of the whole. But when that is not the case, the court are bound to give the construction; and if they refuse to do so, and leave it to the jury, it is error. It was so decided by this court in *Moore v. Miller*, 4 Serg. & Rawle, 279. It has also been decided in other cases, and may be considered as settled law.

There is nothing in the writing in question which is not intelligible without reference to anything extrinsic, and therefore its meaning ought not to have been submitted to the jury. It consists of two parts. The first is in the nature of a certificate of the truth of certain facts antecedent to the writing. The second is a covenant by Blaine, that he will convey certain lands to Davis. In the first place, Blaine certifies that in the month of May, 1781, he sold to Davis seven hundred acres of land, situate in Middletown township, Cumberland county, two miles from the town of Carlisle; and that a survey made by Samuel Lyon, deputy surveyor, containing two hundred and nineteen acres and seventy-six perches; and the allowance of six per cent. is part of the aforesaid tract, for which the said Davis paid him four pounds five shillings, specie, per acre. Then follows an engagement of Blaine to make the said Davis, or his assigns, a deed of conveyance for the aforesaid two hundred and nineteen acres and seventy-six perches clear of every incumbrance up to the first of March, 1775. The dispute on the construction of this writing was, whether the payment of four pounds five shillings, specie, per acre, referred to the whole tract or only to the two hundred and nineteen acres and seventy-six perches which, by the subsequent part of the writing, Blaine agreed to convey. The payment might, without any great violation of grammar, have reference either to the whole tract or the part. But the strict rules of grammar are not to govern the construction of writings made by men who are not grammarians. The meaning is to be sought for by a consideration of the whole. Parts that are obscure may be explained by those which are not doubtful. I am of opinion that the payment intended in this

instrument is not for the whole seven hundred acres, but the two hundred and nineteen acres and seventy-six perches, because it is the latter only which Blaine immediately after engages to convey. If he had received payment for the whole it would have been his duty to convey the whole, and there is no conceivable reason why he should declare that he had been paid for the whole, and yet engage to convey but a part. But a much more important question in this cause was, whether the defendants were estopped from denying the payment for the two hundred and nineteen acres and seventy-six perches which Blaine engaged to convey to Davis. It appears that the instrument on which this action was founded was in the handwriting of Blaine, that it was loosely drawn and at a time when he had not before him the articles of agreement between him and Davis for the sale of the whole tract of land, of which the two hundred and nineteen acres and seventy-six perches were a part. This is evident because these articles are dated in the month of June, 1782, instead of May, 1781, as mentioned in the writing on which this suit was brought; and the contract was for the sale of a tract containing, not seven hundred, but eight hundred and thirty-two acres. The terms of sale were, six hundred pounds down, four bonds for six hundred pounds each, payable on the first of April, 1783, 1784, 1785 and 1786, and one bond for five hundred and thirty-seven pounds fifteen shillings, payable on the first of April, 1787, making the whole amount of purchase-money three thousand five hundred and thirty-seven pounds fifteen shillings. On the payment of all these bonds, with such interest as might accrue on them, Blaine was to execute a conveyance to Davis. The defendants offered to prove that all these bonds remained in their possession uncanceled, and that no payment of anything but a very small sum, had ever been made by Davis; and the court of common pleas admitted evidence for that purpose. There is no doubt that the certificate of Blaine was evidence of his having received full payment for the two hundred and nineteen acres and seventy-six perches.

But it does not follow that it was conclusive evidence, nor do I think it was. It is very common, in deeds for the conveyance of land, to acknowledge the receipt of the purchase-money in the body of the deed, and also in a separate receipt at the bottom, or on the back of it, though no money has been paid, but only secured to be paid by bond or otherwise. But whenever the grantee has attempted to avail himself of these receipts, the grantor has been permitted to show that the money was not

paid. It was so decided by this court, in the cases of *Jordan v. Cooper*, 3 Serg. & R. 564, and *Hamilton v. McGuire*, Id. 355; also, by the supreme court of New York, in the case of *Bowen v. Bell*, 20 Johns. 338 [11 Am. Dec. 286]; and, in Maryland, in the case of *O'Neal v. Lodge*, 3 Harr. & McHen. 433 [1 Am. Dec. 377]. The principal intent of Blaine's certificate of the sixth of June, 1783 (the present cause of action), seems to have been to assure to Davis the immediate conveyance of two hundred and nineteen acres and seventy-six perches, part of the larger tract, which he had sold him by the articles of the twenty-ninth of June, 1782, and of which, by these articles, Davis was not entitled to a conveyance, until the price of the whole eight hundred and thirty-two acres was paid. And he might, perhaps, have acknowledged the payment of the price of the smaller quantity, which he agreed to convey, although, in fact, he had not received the money, but only a bond for it; just as he would have acknowledged the receipt of the purchase-money of the whole eight hundred and thirty-two acres, if he had made a deed of conveyance for the same, and taken security instead of receiving the money. And if he had made such a deed, containing such an acknowledgment of payment, he would have been permitted to show that in truth he had not received the money, but taken the bonds of the grantee, which remained unpaid. I am of opinion, therefore, that there was no estoppel, created by the writing of the sixth of June, 1783, but the defendants might be let into the evidence to show the truth of their case.

Another point remains for consideration, whether this action can be supported by the administrator of Davis? It is objected by the defendants, that the action should have been brought by the heir, who, if the purchase-money had been paid, is entitled to a conveyance, and that the administrator has no right, by a recovery of damages, to convert the real estate into personalty. I will first observe, that under the circumstances of this case, an action for the recovery of damages is the only remedy which can be had on the contract. Ephraim Blaine having sold the land to a *bona fide* purchaser who paid full value, and had no notice of this contract between Blaine and Davis, the land is gone forever. The purchaser has the legal estate, and there is no equity against him. But who is to bring the action for damages? The administrator of Davis, I apprehend, and no other person. What other person can be entitled to an action? The contract was with the testator. The action for breach of contract is a personal action, which is transmitted to the personal

representative. The heir does not succeed to an action of this kind. There are contracts which belong to the realty, and run with the estate; and such descend to the heir. If the ancestor, for instance, make a lease reserving rent, the rent which accrues after the death of the ancestor, is incident to the reversion, and goes to the heir, who may support an action on the lease made by his ancestor.

So, covenants by a tenant, for making repairs, or doing other things on the demised property for the benefit of it, run with the land, and the person seised of the reversion may support an action for breaches in his own time. But in the present instance, Davis was seised of no estate, and therefore no estate descended to his heir; there was no estate to which a covenant could be attached. There was an equity, indeed, but that is quite another thing. Where we speak of covenants running with the land, for the purpose of supporting an action, we mean a legal estate in the land. It is not observed that on the present occasion there is any clashing of interest between the administrator and the heir. But it must not be supposed that the administrator can at his pleasure convert an equitable estate into personal property. For example: suppose the heir of Davis to be in possession of this estate, no conveyance having ever been made of it by Blaine to a third person, and the whole purchase-money having been paid; in that case the heir would have a complete equity, with which he might, if he thought proper, rest content, without calling for a conveyance of the legal estate. If the administrator under such circumstances should bring an action for damages, because the legal estate was not conveyed, he could recover no more than nominal damages.

In the present case where the heir has never had the possession, and never can have it, the land being conveyed to a third person, if damages are recovered, they will, in the first place, be assets in the hands of the administrator for the payment of Davis's debts; which are said to be large enough to absorb the whole. It is unnecessary therefore to consider who would be entitled to the surplus, if there were any. The only question for present adjudication is whether the administrator can support the action. And that he can, I think there is no doubt. Indeed, I do not consider it a new point. The principle was decided by this court, in the case of *Freeman v. Pennock's Administrator*, Lancaster, May, 1821. There, Pennock and Freeman had purchased a tract of land in partnership. Each paid a moiety of the purchase-money, and the conveyance of the

whole was made to Freeman in trust as to a moiety, for Pennock. Freeman refused to make a conveyance to Pennock of his moiety. Pennock died, and an action was brought by his administrator for the recovery of damages. The question was made whether the action could be supported in his name, and it was held that it could. As we have no court which has power to compel the specific execution of contracts, there may be cases where the heir, who in chancery might enforce a conveyance of the legal estate, may with us make use of the name of the administrator to accomplish the same purpose through the medium of damages. But this is entering into a wider field than the present subject demands. Suffice it say that in this case the administrator may support the action. I am of opinion that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

This case is cited in *Sidwell v. Evans*, 1 Penn. 386, and in *McKean v. Wag-enblast*, 2 Gra. 466, on the point that the construction of written evidence is for the court, and of parol evidence for the jury, and that an admixture of parol with written evidence draws the whole to the jury; and in *Cox v. Henry*, 32 Pa. St., 20, to show that the consideration in a deed may be inquired into. On this latter point see, also, *O'Neale v. Lodge*, 1 Am. Dec. 377 and note; note to *Schemerhorn v. Vanderhayden*, 3 Id. 306; *Duvall v. Bibb*, 4 Id. 506; *Bowen v. Bell*, 11 Id. 286; *Chiles v. Coleman*, 12 Id. 396. On the question whether the administrator or the heir is the proper party to sue for damages, see *Wells v. Cowles*, 10 Id. 115.

KENNEDY v. WACHSMUTH.

[12 SERGEANT & RAWLE, 171.]

ORPHANS' COURT AMENDMENT.—The orphans' court may order its proceedings amended by adding to an administrator's account an affidavit which had before been taken in court but not filed.

ORPHANS' COURT ORDERS OR DECREES can not be controverted unless it had exceeded its jurisdiction.

ACTION on the case, brought by Kennedy against Wachsmuth, to recover damages for the non-performance of a contract for the purchase of certain lots of land in the county of Philadelphia. By said contract the plaintiff was to give to the defendant a valid and legal title to the lots; and the latter alleged that the title offered by the former was not valid and legal. The validity of Kennedy's title depended upon that of the sale of the real estate of John C. Wells, made by order of the orphans' court. The other facts are stated in the opinion.

Scott, for the defendant. Plaintiff's title is not good, inasmuch as the sale made under the order of the orphans' court was invalid, no account under oath having been exhibited prior to said sale, as required by the act of April 19, 1794. The orphans' court, being a court of limited jurisdiction, must conform to the act in its proceedings, or they may be examined and set aside in a collateral suit. In *Messinger v. Kintner*, 4 Binn. 97, it was held that an unauthorized decree of an orphans' court may be questioned, in a collateral suit, by or against a person claiming under that decree. The decree in this case, if unauthorized, may at any time be attacked in a suit for the land by the defendant. The amendment allowed by the court does not remove the objection. The affidavit came too late, as the act requires it to be filed before the order of sale is made. The spirit of the act requires that all the administrators should join in the oath or affirmation. Here the affirmation was made by only one of the administrators.

Purdon, for the plaintiff. In sales by order of the orphans' court, great allowances are made for want of form: *Snyder's Lessee v. Snyder*, 6 Binn. 497; *Bickle v. Young*, 3 S. & R. 235; *Price v. Johnson*, 4 Yeates, 528; 2 Yeates, 118; *Huckle v. Phillips*, 2 S. & R. 7. The order of the court in 1822 completely cured any defect that ever existed in the record. The truth of the records of the orphans' court, in matters within their jurisdiction, can not be disputed: *Selin v. Snyder*, 7 S. & R. 172. The objection that only one of the administrators made the affirmation was overruled in *Snyder's Lessee v. Snyder*, 6 Binn. 497.

By COURT. The question in this case is, whether a sale of the real estate of John C. Wells, esq., deceased, made by order of the orphans' court of Philadelphia, was valid?

It is contended, on the part of the defendant, that the orphans' court had no power to make the order for sale, because the administrators of John C. Wells did not, previous to the said order, exhibit an account upon oath, of all the intestate's debts, which had then come to their knowledge, as is required by the act of the nineteenth of April 1794, section 20. On inspecting the record of the orphans' court, we find that on the fourteenth of January, 1813, the administrators of Wells, William Lewis and Mary Wells, petitioned for an order of sale of the real estate, which was granted; and, in pursuance thereof, the estate was sold, and the sale confirmed by the

court. At that time, no account of the debts of the intestate, verified by the oath of the administrators, appeared upon the record. But on the nineteenth of March, 1822, the orphans' court made an order, "That the record should be amended by adding to the account exhibited by the administrators of John C. Wells, of all the intestate's debts, the affirmation of William Levis, one of the administrators, as taken in court by the said Levis, at the time of exhibiting the said account, and before any order of sale; that the same is a just and true account of all the intestate's debts, which had then come to the knowledge of the said administrator." It cannot be doubted that the court had power to order this amendment. The affirmation ought to have been recorded at the time it was made, and the not entering it of record, was no more than a clerical omission. So long ago as the year 1650, an amendment was permitted, by causing judgment to be entered on a verdict which the prothonotary had omitted, and this, too, after an execution had been issued, and exception taken to the proceeding: *Styles*, 229.

In considering the record before us, therefore, we must now take it that the affirmation of Levis was made previous to the order of sale. Then all is right, for the record cannot be contradicted. The orders or decrees of the orphans' court, where it exceeds its jurisdiction, may be controverted. But where it is acting within its jurisdiction, the truth of what is asserted on record, cannot be denied. This was decided in the case of *Selin v. Snyder*, 7 Serg. & Rawle, 172. But it is objected, that, granting the affirmation in this case to have been made by William Levis, according to the amended record, still it is defective for want of the oath or affirmation of Mary Wells, the administratrix. The very same objection was taken and overruled by this court, in *Lessee of Snyder v. Snyder*, 6 Binn. 497 [6 Am. Dec. 493].

It is the opinion of the court, therefore, that the proceedings in the orphans' court were according to law, and the sale of the real estate of John C. Wells was valid. Judgment is to be entered for the plaintiff.

Judgment for plaintiff.

This case is cited in *Fox v. Winters*, 4 Rawle, 176; and in *Hoffman v. Coster*, 2 Whart. 471, on the point that the decree of the orphans' court is conclusive in a case where it has jurisdiction. On the power of the court to amend its record, it is cited in *Jones v. Orum*, 5 Rawle, 256; and in *Bishop's Appeal*, 26 Pa. St. 471. In *Commonwealth v. Oliver*, 2 Para. 428, it is cited to show that

where an orphans' court had transcended its jurisdiction, all done was void. In *Brotherline v. Mallory*, 8 Watts, 136, Huston, J., says, that while he does not deny the correctness of this and other decisions, he cannot clearly comprehend them or the principle necessary to support them.

On the right of a court to amend its records, see note to *Atkins v. Sawyer*, 11 Am. Dec. 193.

That the decree of an orphans' court cannot be collaterally impeached, see *Van Dyke v. Johns*, 12 Am. Dec. 76.

BUTLER v. COMMONWEALTH.

[12 SERGEANT & RAWLE, 237.]

TO UTTER AND PUBLISH A COUNTERFEIT NOTE of a private unauthorized banker, knowing it to be counterfeit, is an indictable offense.

ERROR to the mayor's court of the city of Philadelphia. Butler, the plaintiff, was convicted in said court of having uttered and published a counterfeit note, issued by Stephen Girard, a private banker, knowing the same to be counterfeit, with intent to defraud Ann Mussina.

Brewster, for the plaintiff.

Pettit, for the commonwealth.

By Court, GIBSON, J. Did it conclusively appear that the legislature intended to forbid the circulation of the notes of unauthorized bankers, it would be our duty, in the furtherance of their intention, to declare the passing of the note, for which the plaintiff in error is indicted, not to be an offense. But there is such moral turpitude in the act, and it is, in its consequences, so prejudicial to the public, that nothing but the clearest expression of the legislative will would justify us in saying that those who receive, and by their acts give currency to the notes of unauthorized bankers, are not within the protection of the law. The legislature have prohibited the issuing of notes, in the nature of bank notes, by individuals or associations who have not been incorporated for the purpose; and, with the intention of impeding their circulation, at one time went further, by declaring them void in the hands of the holder. Experience, however, soon proved, that to prevent their circulation was impossible; and that to prohibit the recovery of them by action, was rather an encouragement to the issuing of them than a restraint, in consequence of which, the impediment attempted to be thrown in the way of their circulation was withdrawn, by declaring that suits might be maintained on

them, while the prohibition against the issuing of them, was suffered to remain.

On what ground, then, can it be maintained that it is not indictable to utter and publish them, knowing them to be forged? They are as available in the hands of the holder as if they were lawfully issued, and under our act of assembly are the subject of larceny. It would be going too far, then, to say that the public should be exposed to the frauds of a most unprincipled class of offenders, on the ground of a supposed policy in restraining the circulation of a species of paper currency, which is expressly declared to be available in the hands of the holder, merely because the legislature has imposed a penalty on the issuing of it. I am, therefore, satisfied that the judgment of the court below is warranted by the law.

Judgment affirmed.

STEWART v. COULTER.

[12 SERGEANT & RAWLE, 252.]

SET-OFF—ONE OF SEVERAL DEFENDANTS is entitled to set off a debt due him individually from the plaintiff.

THIS was a suit brought by Stewart against Coulter and Day, to recover for services as supercargo of the ship *Coromandel*, and was tried before Mr. Justice Duncan, at *nisi prius*. The ship arrived in Philadelphia in June or July, 1819, and on August 18, 1819, the plaintiff assigned his claim to Salaignac & Stevenson, for whose use this suit was brought. On the trial Coulter offered to set off a judgment which he had obtained against Stewart, long prior to his assignment to Salaignac & Stevenson. His honor admitted the set-off, and plaintiff moved for a new trial.

Tob and Condy, in support of the motion.

Binney & Sergeant, contra.

By Court, DUNCAN, J. I cannot consider the question foreclosed of the right of a defendant, who is sued with another, to set off a debt due to himself. The rule that the set-off must be such as the defendants could sue for in their own name, was a very narrow construction of the statute of set-off. It savors more of technicality than of a liberal construction, and even in England the question is decided by showing in whom the beneficial interest is; and it is expressly so in Pennsylvania, as appears

by *Robinson v. Beall*, 3 Yeates, 267; *Boyd's Executor v. Thompson's Executor*, 2 Id. 217; and *Murray v. Williamson*, 3 Binn. 135. At the trial my opinion was that the indebtedness of the plaintiff to one defendant, was, of itself, unless there was some superior equity in a third person, a subject of set-off by the defendant, although he had been sued with others, and might be set off on the trial under our act of assembly, which has always been considered as more comprehensive than the British statute of 2 Geo. II, c. 22, and 8 Id. ch. 24. That opinion has not been changed and is unchangeable; for if the very able arguments of the counsel of the plaintiffs could not change it, it cannot be shaken.

New trial refused.

This case is cited and its authority recognized in *Crist v. Prindle*, 2 Rawle, 123; *Tustin v. Cameron*, 5 Whart. 380; *Archer v. Dunn*, 2 W. & S. 361; *Balsley v. Hoffman*, 13 Pa. St. 612; and in *Stuart v. McHenry*, 3 Phila. 343.

For a full discussion of the subject of set-off see note to *Gregg v. James*, 12 Am. Dec. 152; also, *Henderson v. Lewis*, 11 Id. 737; *Pitcher v. Patrick*, 12 Id. 152.

RIDGWAY v. FARMERS' BANK OF BUCKS COUNTY.

[12 SERGEANT & RAWLE, 266.]

EVIDENCE OF PUBLIC DOCUMENTS, AND OF BOOKS OF CORPORATIONS.—Where an original document is of a public nature, an examined copy thereof is admissible as evidence; but this rule does not apply to the books of an ordinary private corporation.

JOINT POWER, HOW MAY BE EXECUTED.—If the president and cashier of a bank jointly have the power to borrow money or obtain discounts, and they both agree upon the plan of borrowing the money or obtaining the discount, it is not necessary that both should sign the paper, to carry their plan into effect.

POWERS OF DIRECTORS.—An act of incorporation stating that "the affairs of the company shall be conducted by the directors," gives them power to authorize the president and cashier to borrow money.

CORPORATION MAY ACT WITHOUT A RESOLUTION.—It is proper to leave it to the jury to determine from the evidence, independently of any resolution of the board of directors, whether they had directly or indirectly sanctioned an act done by their agent.

INDORSER—WHEN NOT AFFECTED BY FRAUD.—If the negotiable note of a corporation is fraudulently given by one having authority to give it, and afterwards comes fairly, in the usual course of business, and without notice of the fraud, into the hands of a third person, the latter cannot be prejudiced by proof of the fraud.

ERROR to the common pleas in an action on a bill drawn by Joseph Hulme, president of the defendant on the cashier of the

same, dated the twenty-second of June, 1821, payable sixty days after date to Hollingshead, or order, by whom the same was indorsed to the plaintiff. The bank refused payment, and denied the authority of the president to draw the bill. The following is a copy of the resolution of the directors of the sixth of July, 1819, referred to in the opinion: "Resolved, that it is the duty of the board of directors, to support the credit of the paper of the bank; and that funds, during the present stagnation of trade, must be raised. We therefore authorize the president and cashier, as often as they find occasion, to borrow money or obtain discounts, in order to raise funds for the purpose aforesaid." The plaintiff offered in evidence, an examined copy of certain entries in the discount book of the bank of Pennsylvania to show that the notes therein mentioned were discounted by the said bank, but the court rejected it, and exception was taken. The other facts are stated in the opinion.

McIlwaine and Condy, for plaintiff in error.

1. The examined copy of the discount book of the bank of Pennsylvania should have been received in evidence. An examined copy of public books, such as this is always admitted: Phil. Ev. 339, 345, 346; 14 Mass. 178.

2. The court erred in charging the jury that the resolution of July 6, 1819, did not authorize the president alone to borrow money on the draft in question. The resolution does not require any paper upon which money is borrowed under its authority to be signed by both the president and the cashier. It was only necessary that both should assent to the plan of borrowing; not that both should join in the mode of carrying that plan into effect: *Fletcher v. Bank of the United States*, 8 Wheat. 338. The bank, under the terms of its charter, had the power to borrow money; and the act of March 21, 1814, imposes no restrictions upon it, as to the mode of raising money. The directors possessed all the powers necessary to effect the objects for which the bank was incorporated. It was necessary to borrow money. The directors authorized the president and cashier to do this without restriction as to the kind of paper to be used. The court erred in drawing a distinction between an authority to draw notes, and an authority to draw a draft. It could make no difference to the bank by which of these means the money was raised. Indeed it was not necessary that the money should be obtained through the medium of paper of any kind; it might have been obtained on a mere verbal promise: *Chitty on Bills*,

34, 36; 15 Mass. 39; 11 Id. 97; Paley on Agency, 144; *Whitehead v. Tuckett*, 15 East, 400.

3. Collusion between Hulme and Hollingshead to defraud the bank could not affect the rights of a third person who acquired an interest in the draft without notice, and for value. This paper is an inland bill of exchange, and there is nothing in Pennsylvania to restrict its negotiability. A promissory note is a distinct thing. Bills of exchange were negotiable in the time of Charles II. before the settlement of Pennsylvania. The statutes of 9 and 10 Wm. III., and 3 and 4 Ann, do not create, but only declare their negotiability; and as to negotiability, there is no distinction between foreign and inland bills. Promissory notes are made negotiable by statute; bills of exchange, by the law-merchant. The president was the admitted agent of the bank; if he committed fraud against his principal, the latter is bound, if the person who claims under the agent is not in fault.

Killera and Hopkins, for defendants in error.

1. The copy of the book of the bank was not evidence, and was properly rejected. The original was not evidence; and if it was, a copy could not be received. The original should have been produced, or the clerk who made the entry; or in case he could not be had, proof of his handwriting, and that he was a clerk.

2. We deny that the directors had a right to delegate to the president and cashier the power to raise money. The charter does not give any such right. All paper issued by the bank should be signed by the president, and countersigned by the cashier. The signature of one only will not do. Thus where a parish authorized a committee of three to build a meeting-house, the acts of one only were held not to be binding: 12 Mass. 185. Corporations have no powers but those expressly granted to them, and such as are necessary to carry them into effect: 15 Johns. 283; 2 Cow. 709, 711; 2 Johns. 109; 14 Mass. 58. But if the directors had power to authorize the president and cashier to borrow money, it could only be done by them jointly. There is no evidence that the cashier consented to this act of the president. The resolution was passed in 1819, and spoke of the present stagnation of trade; this draft was not made until 1821, and the cashier swore that the resolution was confined to the emergency existing at the time, and that he never acted under it.

3. The plaintiff can not recover if there was fraud between Hulme and Hollingshead. Bank checks are not inland bills of exchange, and should be carried in on the day after their issue: Chitty on Bills, 17, 192, 413. This check or draft is not in the usual course of business, but payable sixty days after date. But even if it is an inland bill, it is not negotiable. Foreign bills are negotiable by the law-merchant, but inland bills are made negotiable in England by statutes 9 and 10 Wm. III. c. 17, and 3 and 4 Ann. c. 9, which are not in force in Pennsylvania, so far as inland bills are concerned. The draft in question is rather a promissory note than an inland bill, and must be governed by the law relating to promissory notes.

By Court, TILGHMAN, C. J. It is a rule of law that where an original is of a public nature, and admissible in evidence, an examined copy is evidence. This rule is necessary for the preservation of public papers, and for the public convenience, because those papers should always be in a known place, to which access may be had by all. As an example of what may be called public papers, the English authors mentioned the journals of both houses of parliament, entries in the books of the Bank of England, and of the East India Company, parish registers, the books of the commissioners of the land-tax, and excise, and court rolls of manors. The Bank of England and East India Company have such immense concerns connected with the government that their interests are inseparable, and their books and papers are truly of a public nature. But to give that name to the banks of Pennsylvania, and on the same principle to incorporated insurance companies, etc., with which the country has been inundated, might produce serious consequences. We know that these books are often badly kept, and it would be dangerous to admit copies in evidence when the originals may easily be had, nor should even the originals be admitted without proof by whom the entries were made.

The proper witnesses to prove the entries are the clerks by whom they were made, if to be found. But if dead, or out of the jurisdiction of the court, proof may be made of their handwriting. I would not be understood, however, as laying it down as a general rule, that in all cases the original books must be produced. That might often be extremely inconvenient; and perhaps there would be no danger in admitting an examined copy, with proof that the original entry was made by an officer of the bank,—the officer himself to prove this, if to be found, and, if not, his handwriting to be proved. But in the

case before us there was a naked offer of an examined copy, uncorroborated by any other evidence whatever. This is not a new point. We decided it at Pittsburg, in the case of *The Philadelphia Bank v. The Executors of Thomas Officer*, at September term last; and in accordance with that decision I am of opinion that the copies offered in this case were properly rejected. Besides this exception to the evidence, exceptions were taken to the charge of the court, which I will now consider.

1. It was given in charge by the jury, that neither by the charter of the bank, nor the resolution of the board of directors, of the sixth of July, 1819, had the president alone power to draw the bill in question. To this I agree, with some explanation. The act of incorporation gives no authority to the president alone to issue paper. It is enacted by the eighth section of the incorporating act, "that bills or notes issued by order of any of the said corporations, signed by the president and countersigned by the cashier, promising the payment of money to any person or persons, his, her, or their order, or to bearer, though not under seal of the said corporation, shall be binding and obligatory on such corporation." This provision does not apply to the case before us, for this is not a bill promising to pay money; nor is it to be construed as a prohibition of drawing a bill like the present, unless under the seal of the corporation, or signed by the president and countersigned by the cashier. When one bank draws on another, or on an individual, I believe the usual course of transacting the business is to have the draft signed by the cashier and not by the president. And this is authorized by the general practice recognized by the directors. The old doctrine, that a corporation can do no act but under seal, has been frequently determined not to be applicable to banks created by statute, so far, at least, as concerns the usual course of business in drawing and discounting notes and bills. Still, the charge of the court of common pleas was accurate in laying down the law that the charter of this bank gives the president alone no power to make this draft. I think it was accurate, also, in saying that no such power was given to the president alone by the resolution of the directors of the sixth of July, 1819. That resolution confines the power to the president and cashier jointly, and for this there was good reason. The cashier of the country banks is generally a more efficient and intelligent officer than the president. The cashier and president jointly, but neither sep-

arately, were authorized to borrow money or obtain discounts. But if it was intended to instruct the jury that although both these officers had agreed to a plan of borrowing money or obtaining discounts, yet this plan could not be executed but by the use of paper signed by both of them, I cannot assent. The resolution required no such thing. It was satisfied by the agreement of both president and cashier, though the mode of effecting their purpose should be by a note or bill signed or indorsed by only one of them. This very point came before the supreme court of the United States in the case of *Fletcher v. The United States*. There the board of directors of The Planter's Bank (of New Orleans) passed a resolution "that the president and cashier be authorized to adopt the most effectual measures to liquidate, the soonest possible, the balance due, to the office of discount and deposit in this city (New Orleans), as well as others presently due, and which may in the future become due, to any banks in this city." A note for ten thousand dollars, drawn by Fletcher, came to the possession of the Planter's Bank, and was indorsed by their cashier to the bank of discount and deposit, in part payment of a balance due. It was objected that the cashier alone had no authority to make the transfer. But Judge Story, who delivered the opinion of the court, held the contrary, and thus expressed himself: "The president and cashier were at liberty to raise money for this purpose from the general funds, in any way which the ordinary course of business would justify, and which they should deem the most effectual measure. They might, therefore, agree that the cashier should indorse the note in question, and should procure it to be discounted at the bank of the United States and the proceeds to be carried to their credit." I perfectly agree with the law as thus laid down by Judge Story, and, therefore, when this cause comes to trial again it will be proper for the court to instruct the jury accordingly.

The counsel for the defendant in error have denied the power of the directors to authorize the president and cashier to borrow money; but in this I think they are wrong. There again the case of *Fletcher v. The United States Bank*, 8 Wheat. 362, bears upon the question; and, independently of that case, the reason of the thing proves that the power exists. By the act of incorporation, section 7, "the affairs of the company shall be conducted by the directors." The power is general, and must be construed to extend to such things as are convenient and usual in the course of conducting the banking business. I have

mentioned before that the cashier is usually entrusted with the power to sign drafts by one bank on another, or on individuals. If this kind of business could only be done by an order of the board, in such case, it would be impossible to get forward. Neither would it be possible, in difficult times, when it was necessary frequently to borrow money to transact the business with tolerable convenience or facility, if a resolution of the board was required on each note, draft or discount, for the purpose of borrowing. I am of opinion, therefore, that the directors did not exceed their powers in the resolution of the sixth of July, 1819.

The president of the court of common pleas left it, very fairly and candidly, to the jury to decide whether, from the evidence, it could be inferred that the board of directors (independently of their resolutions of July, 1819) had, directly or indirectly, sanctioned the bill drawn by Joseph Hulme; and told them that if they had the bank was bound by it. The plaintiff has no cause of complaint on this head. But there is another very important point, in which error has been alleged. The judge charged, that even supposing a bill like that on which this suit was brought, might lawfully have been drawn by the president alone, for the purpose of raising money for the bank, yet, if by fraud or collusion between him and Hollingshead, it was applied to the use of Hollingshead, the plaintiff could not recover, though it come to him fairly, in the usual course of business, and without notice of fraud or malpractice. I confess I do not see on what ground this opinion can be supported. The bill in question has been compared to a promissory note, and then the case of *McCulloch v. Houston*, 1 Dall. 441, has been relied on; in which it was decided that the indorsee of a note, under the act of the twenty-eighth of May, 1715, takes it at his peril. As to that case, suffice it to say, at present, that although never overruled it has always been regretted, and must not be considered as a precedent to influence other cases of a dissimilar nature. Now the paper before us is not a promissory note, but a draft or bill, with which the act of 1715 has nothing to do. The plaintiff's action as indorsee is not founded on that act, nor indeed does the act say one word about bills, but is confined to the assignment of bonds, specialties, and promissory notes. The indorsee of an inland bill rests his action on the custom of merchants, and not on any statute of England or Pennsylvania. This will be proved by reference to the statutes of 9 and 10 Wm. III., c. 17, and 3 and 4 Ann, c. 9. It will be seen that an

action by the indorsee of a bill was in use before either of these statutes, and therefore neither of them gives him an action, although they give him some advantages which he had not before. Considering the case, then, on the general principles of mercantile law, it is very clear that the holder of a negotiable paper, who has obtained it for value in the course of business, and with perfect fairness, cannot be affected by fraud or collusion between the drawer and indorser, of which he had no notice. If he could be so affected, there would be an end to the circulation of paper, and, of course, to the transaction of mercantile business beyond a very small circle. If the president of this bank was authorized to raise money by a bill like the present, the directors who trusted him must run the risk of his integrity; and should a loss happen, it must be borne by those who confided in him, and not by an innocent person, who trusted to nothing but the funds of the bank. Whether the president was authorized to make this draft, and in what manner it came to the hands of the plaintiff, will be questions for the jury. This court has only to decide the law. I am of opinion there was error in the charge, and therefore the judgment is to be reversed and another trial ordered.

Judgment reversed, and a *venire facias de novo* awarded.

This case is cited as to the admissibility of books of banks and copies thereof, in *Gochenaner v. Good*, 3 Penn. 281; and in *Gauzer v. Fricke*, 57 Pa. St. 318. The court, in *Bullock v. Wilcox*, 7 Watts, 329, while discussing the case of *McCallough v. Huston*, cite the criticism expressed by Tilghman, C. J., on that case, in the opinion in this case. In *Louden v. Tiffany*, 5 W. & S. 369, it is cited to show that a promissory note was liable to set-off, although payable to order, in the hands of an indorsee.

As to the admissibility of books of corporations in evidence, see *Highland T. Co. v. McKean*, 6 Am. Dec. 324; and note to *Commonwealth v. Woelper*, 8 Id. 640. As to who is a *bona fide* holder who will not be affected by fraud, see note to *Bay v. Coddington*, 9 Id. 272; and *Coddington v. Bay*, 11 Id. 342.

McWILLIAMS v. MARTIN.

[12 SERGEANT & RAWLE, 269.]

DEED—WHAT WILL PASS REAL ESTATE.—An assignment of "all debts, dues or demands wheresoever and whatsoever, real, personal, or mixed, which are due and owing, or of right belonging to me, either by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise," passes real estate.

DECLARATIONS OF GRANTOR to show what he intended to pass by his deed are inadmissible.

ERROR to the district court of the city and county of Philadelphia. Plaintiff brought an action of ejectment against defendant to recover one fourth part of a house and lot in Philadelphia. On the trial, it appeared that plaintiff having obtained a judgment against John M. Martin, son of defendant, issued a *fi. fa.*, which was levied upon the premises in question, which were subsequently sold by the sheriff under a *venditioni exponas*, and purchased by plaintiff. At the sale, defendant gave notice that the property belonged to her, but no conveyance from John M. Martin to the defendant could be found on searching the recorder's office. The defendant gave in evidence the following assignment from said John M. Martin to her, dated the third of November, 1814:

"Know all men by these presents, that I, John Martin, of the city of Philadelphia, mariner, in consideration of the sum of one thousand dollars, to me paid by Elizabeth Martin, gentlewoman, the receipt whereof is hereby acknowledged, as also for divers other good and valuable considerations, have granted, bargained, sold, conveyed, and assigned, and by these presents do grant, bargain, sell, convey and assign all debts, dues, or demands wheresoever and whatsoever, real, personal, or mixed, which are due and owing, or of right belonging unto me, either by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise, or which hereafter may become due. The said Elizabeth Martin to have and to hold the same unto her, the said Elizabeth, her heirs and assigns forever. In witness whereof," etc.

The defendant was allowed to prove, against plaintiff's objection, that John M. Martin has said that the paper in question was a conveyance to his mother of his share of the estate, and that it was drawn by a lawyer.

Verdict for defendant. Plaintiff removed the record by writ of error.

P. A. Brown, for the plaintiff.

Mahany, for the defendant.

By Court, DUNCAN, J. The construction of the deed is matter of law. If the record had not informed us to the contrary, I should have supposed it the conveyance of some person not conversant in conveyancing. But be it drawn by whom it may, clerk or layman, it must receive the same construction. The controversy does not respect words limiting an estate, because

they are absolute to her and her heirs, technical words of limitation and perpetuity.

Words describing the subject of the grant are very different from words limiting the estate granted, and except as to words of limitation, courts are bound to give the same effect to intention in a deed as in a will; for if there was a distinction as to description, between deeds and wills, those distinctions would so multiply that a knowledge of the common law would become rather a matter of memory than of judgment or reason.

Now, it is impossible to doubt that if Thomas Martin had devised in these words, it would have comprehended his real estate. The construction ought to be favorable to the intent as near as possibly may be.

The law is not nice in grants; neither false Latin nor bad English will make a deed void. When the words are doubtful, the point to be inquired into is the intent of the parties. If the intent be as doubtful as the words, it will be no assistance at all; but if it be plain, we ought to put the construction on it which will best answer the intention, though the words be doubtful; but we cannot put words into a deed which are not there; nor put a construction on words in a deed directly contrary to the plain sense of them. But take the intentions as plain and manifest, and the words doubtful and obscure, it is the duty of judges to find out such a meaning in the words as will best answer the intent of the parties. The rules and maxims which Justice Willes has drawn from Littleton, Plowden, Coke, Hobart and Finch are full of good sense: Willes, 832.

The word demands is not restrained by its association with other words, *noscitur a sociis*, to personals; for it is united with words of realty, as real, personal and mixed; comprehending all, and with words precisely technical, the word heirs and the word inheritance, which is as strong as hereditaments, and will pass real estate, and by such release, all actions real are gone: Co. Lit. 291; 8 Rep. 154; Brooke's Ch. 67, cites 6 T. R. 15. How much stronger are the words used here, though the broad construction of the word demands might be confined to releases, which discharge, and not conveyances, which charge; yet still as it is coupled with the word real, and with words of inheritance, it shows a strong intention to dispose of the realty. The words might, I admit, be restrained by the particular occasion of making the instrument, or by other expressions more limited; but there are none such. The words were used in their most comprehensive meaning.

It never was a rule of construction in deeds that the words

were to be taken in their technical sense, but according to their proper and most known signification; that which is most vulgar and in use. The necessary use of particular technical expressions is chiefly regarded in the sense of law terms, which matter of description is not; and even where these are used, there is always a presumption in favor of technical meaning and inference, yet it is no more than presumption, and it is to be contradicted by the manifestation of a contrary intention; and the primary inquiry in conveyances, as well as in wills, is the intention, and when that appears on the face of the instrument, is clearly and satisfactorily ascertained, and is not contrary to any rule of law, the court is bound to construe it conformably to the intention. Acting on this principle, I do not think that any two men of common capacity could be found to differ in the construction of this conveyance, which clearly on its face intended to convey the real estate of the grantor to his mother, "all property of whatever nature or kind," and this might be supposed to end the controversy. But the record shows that it is open to other inquiries, admitting this to be the legal construction, whether it was fraudulent or not as to the creditors. The plaintiff, a purchaser at sheriff's sale, might be ignorant of the execution of such conveyance. It might have taken her by surprise on the trial, and unprepared to exhibit any evidence to show the fraud; and as the court is of opinion there was error in admitting parol evidence of the declaration and intention of the grantor, justice requires that the judgment should be reversed, and a new trial take place.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Harper v. Blean*, 3 Watta, 475; *Dice v. Sheffer*, 3 W. & S. 419; and *Stone's appeal*, 2 Pa. St. 432, to show what description of property will pass real estate. And in *Rearick v. Rearick*, 2 Pa. St. 73, to show that subsequent declarations are not admissible to contradict a deed.

HARKER v. CONRAD.

[12 SERGEANT AND RAWLE, 301.]

APPROPRIATION OF PAYMENTS.—The creditor has the right to appropriate the payment, if the debtor does not; but this right must be exercised within a reasonable time, and by the doing of some act indicative of the intention. Where neither party makes the appropriation, the law presumes: 1. That the debtor intended to pay in the way most to his advantage, and, 2. If the interest of the debtor would not be promoted by any particular appropriation, then, that the creditor received the money in the way most for his benefit, unless he was bound in conscience to make some other application of it.

ERROR to the district court for the city and county of Philadelphia, in a *scire facias* issued by Conrad and Lancaster, defendants in error, against Harker & Thorn, plaintiffs in error, upon a claim filed under the mechanic's lien law. The *scire facias* was made returnable to December term, 1820.

Hopkins and T. Sergeant, for plaintiffs in error.

Bradford, for defendants in error.

By Court, GIBSON, J. As the charge of the judge was right on all the points but one, it is unnecessary to make any other than that point the subject of particular remark. The jury were directed that, under the circumstances of the case the right to appropriate the payment made on the third of July, 1820, devolved on the plaintiffs below. The circumstances of the case were these: The plaintiffs, Conrad and Lancaster, had distinct claims against the defendants, Harker & Thorn, for labor and materials furnished towards the erection of a house in Walnut street, and certain houses in Fourth street. The last item of their account, in respect of the Walnut street house, is dated the twelfth of February, 1819. The deed from Harker & Thorn to Mr. Hopkins, the purchaser of this house, and the party substantially interested, bear date the fifteenth of May, 1819. The plaintiffs filed their liens against this house, on the first of July following; consequently, Mr. Hopkins purchased without notice. The last item of charge, in respect of the houses in Fourth street, is dated the third of March, 1820; and consequently, on the third of July, 1820, when the five hundred dollars were paid by Harker & Thorn, the plaintiffs had a lien on the houses in Fourth street, which was equally as operative as that on the house in Walnut street, and to perpetuate which required only that it should be filed of record, as had already been done in the case of the house in Walnut street.

The case then was just this: The plaintiffs had separate demands in respect of different houses and liens on those houses respectively, which were equally operative and equally permanent, or, what is the same thing, the means of making them such. A payment was made without actual appropriation by either party, and the plaintiffs, after having suffered one of their liens to expire, claim a right at the trial to appropriate the payment to the discharge of their demand, in respect of which their lien had so expired; and this against a person who had become a purchaser, without notice, of the property on which, according to this mode of appropriation, there would be a sub-

sisting incumbrance. Although, as between the immediate parties, the creditor has a right to appropriate where the debtor has failed to do so, yet, this right must be exercised within, at the furthest, a reasonable time after the payment, and by the performance of some act which indicates an intention to appropriate. It is too late to attempt it at the trial, and, were it otherwise, there would, in the absence of an actual appropriation by the debtor, be no rule on the subject but the will of the creditor, which would, in all cases, be decisive. But such is not the case. In default of actual appropriation, the matter is to be determined by rules and circumstances of equity. The debtor has a right to make the application in the first instance, and, failing to exercise it, the same right devolves on the creditor; but where neither has exercised it, the law nevertheless presumes, in ordinary cases, that the debtor intended to pay in the way which, at the time, was most to his advantage. Thus, if it were peculiarly the interest of the party to have the money received in extinguishment of such demand, the law intends that he paid it in extinguishment of such demand, and that the omission to declare his intention was accidental. Such intention is reasonable and natural, and one which will, in most cases, accord with what was actually the fact; it is, therefore, equivalent to an exercise of the party's right by acts, or an express declaration of intention.

Where, however, the interest of the debtor would not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law then raises a presumption, for the same reason, that the payment was actually received in the way that was most to the advantage of the creditor. I think these principles, as furnishing general rules, may fairly be extracted from the cases. Then, according to this, if the controversy was between the original parties, it would admit of a doubt whether the payment ought not to be considered as having been made on the foot of the account for materials furnished to the houses in Fourth street, because, by having it so applied, the plaintiffs would secure their whole demand, without the expense and trouble of filing their lien against those houses, whilst Harker & Thorn would not have been benefited by having it applied to either demand in particular. But the introduction of a purchaser without notice into the case, leads to an opposite result. He stands in superior equity to Harker & Thorn, who were bound in conscience to protect the title which they had conveyed to him, and

who, there is therefore as much reason to presume, intended to make this payment for his benefit, as there would be to presume that they intended to apply it in the way most conducive to their own interest, if a particular application of it could have produced an equal benefit to themselves. The law ought to presume, and does presume, that every man is governed by the dictates of conscience, and that he will do what honesty requires of him, even though it be against his interest. Such a presumption can prejudice no one, nor does it injure the plaintiffs here. They were bound by every consideration of equity, to perpetuate their lien on the houses in Fourth street, and thus, while they secured themselves, to cast the burden on those whose duty it was to bear it. Having failed to do so, the purchaser stands in superior equity as to them; and they must therefore bear a loss which arose entirely from their own neglect, and which it was their duty to prevent.

Judgment reversed.

APPLICATION OF PAYMENTS.—“Where a debtor owing several debts, makes any payment to a creditor, he has a right to apply it to any debt he pleases. If he makes no specific appropriation, the creditor may apply it as he pleases. And where neither party appropriates it, the law will apply it according to its own notion of the intrinsic equity and justice of the case:” Story, J., in *Cremer v. Higginson*, 1 Mason, 338; *Youmans v. Heartt*, 34 Mich. 401; *Pickering v. Day*, 2 Del. Ch. 333. The creditor is bound to receive and apply the payment according to the intent of the debtor: *Reed v. Boardman*, 20 Pick. 446. In general, if the debtor does not make an application, the creditor may apply it as he pleases, but to this general rule there are some exceptions: 1. He cannot apply it to a debt not due when there is another debt that is due: *Bobé's Heirs v. Stickney*, 36 Ala. 495; *Kidder v. Norris*, 18 N. H. 534; 2. Where he has an account against the debtor in his own right and another against him as trustee, executor or member of a partnership, he must apply it to the personal debt: *Fowke v. Bowle*, 4 Harris & Johns. 566; *Sawyer v. Tappan*, 14 N. H. 352.

Where neither debtor nor creditor has made application, the law makes it for them. What application it will in such case make, depends on the circumstances of the particular case, but the following rules may be deduced from the decisions: 1. It will apply the payment to the debt whose security is most precarious: *Field v. Holland*, 6 Cranch, 8; *Stamford Bank v. Benedict*, 15 Conn. 437; 2. To a debt secured by mortgage, in preference to a simple account: *Pattison v. Hull*, 9 Cow. 747; *Gwinn v. Whitaker*, 7 Harris & Johns. 754; *Robinson v. Doolittle*, 12 Vt. 246; 3. In extinction of a certain in preference to a contingent liability: *Bank of Niagara v. Roosevelt*, 9 Cow. 409; *Portland Bank v. Brown*, 22 Me. 295; 4. To extinguish debts prior in time: *Smith v. Loyd*, 11 Leigh, 512; *Clark v. Knight*, 31 Vt. 701; *Pickering v. Day*, 2 Del. Ch. 333.

To the point of what description of the situation of the building is sufficient, under the mechanics' lien law, this case is cited in *McClintock v. Rusk*, 63 Pa. St. 205; *Kennedy v. House*, 41 Id. 41; *Knabb's appeal*, 10 Id. 190; *Shaw*

v. *Barnes*, 2 Id. 20; and in *Springer v. Keyser*, 6 Wh. 188. In *White v. Miller*, 18 Pa. St. 54, it is cited as authority, to establish the principle that it is the owner's business to see that the materials furnished are used by the contractor in the actual construction of the building, and that it is necessary to prove collusion to discharge the lien. This case was cited by counsel in *Logan v. Mason*, 6 W. & S. 15, on the point of the application of payments, but was held by the court not to be in point, since application was made in the one case and was not made in the other. In *Hopkins v. Conrad*, 2 R. 324, the court say: "This case was tried before, and is reported in 12 S. & R. 301." * * * "I refer to that case for the general law as to what debt a payment made and not appropriated at the time, shall be applied, and adopt the principle there stated, as applicable to this matter." On application of payment on a note, see *North v. Mallett*, 2 Am. Dec. 622; on a mortgage, *Dorsey v. Gassaway*, 3 Id. 557.

EQUITY CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

EX PARTE RUTLEDGE.

[1 HARPER'S EQ. 65.]

DIVIDENDS, APPORTIONMENT OF.—A person who was entitled for life to dividends on certain bank stock, "to be paid half yearly as they shall be received from the bank," having died just before a semi-annual dividend was declared, it was held that the dividend should be apportioned and a part paid to his executor.

Mrs. ANN COSLETT, on April 17, 1816, assigned by deed to trustees, certain shares in the Planters and Mechanics' Bank of Charlestown, "in trust, nevertheless to receive the dividends on the same and pay and apply the same half yearly, as they shall be received from the bank, unto Ann Grimke Rutledge and her husband, William Rutledge, to and for their joint use; and from and after the decease of either of them, in trust to pay and apply the dividends aforesaid, to the survivor, during his or her natural life," etc. William Rutledge survived his wife, but died in June, 1822, only a few days before a semi-annual dividend on the stock became due. His executor petitioned to have that part of the dividend which accrued up to the time of his death, paid to him. Mrs. Coslett and her son opposed the petition.

WATIES, Chancellor. I think the claim of the petitioner is a just one and comes within the general rule adopted by the court on the subject. An entire interest which only accrues at particular periods cannot be apportioned, because it is not susceptible of any intermediate division, and, therefore, it was necessary in England to provide, by a positive statute, for the

apportionment of rent. But it appears from all the cases which have been referred to, that wherever an interest is daily accruing, it may be apportioned; as in the case of interest on a bond, which accrues *de die in diem*: *Banner v. Lowe*, 13 Ves. 135. So, when the fund is provided for maintenance, which is still more favored. "This," say the court, in *Hay v. Palmer*, 2 P. Wms. 503, "is a stronger case than that of interest, for it is for daily support." The present claim is of that nature, it is expressly declared by the deed of Mrs. Coslett, that the dividends on the stock settled were intended as maintenance, and there is reason to believe that the advances made by the petitioner to his testator were on the credit of them. They were the only funds on which the testator depended for subsistence, and they were daily accruing; for although payable only half yearly, yet they arose out of the daily profits of the bank, which might be ascertained at any intermediate time.

It is, therefore, ordered and decreed, that it be referred to the commissioner to ascertain the amount of the dividends which had accrued at the time of the death of the petitioner's testator, on the stock settled on him for life, and that the same be paid to the petitioner as his executor.

On appeal, *Grimke*, for the appellants, argued that there could be no apportionment in such a case, and cited: 3 Atk. 503; Amb. 279; 2 Ves. 672. Decree affirmed by the whole court.

THE APPORTIONMENT OF DIVIDENDS here allowed is contrary to the generally accepted rule. And in many instances the reasons assigned for the decision in the principal case have been urged in support of opposite conclusions. That it is difficult to ascertain the time when the earnings of a corporation were made, and that they are variable of necessity, are expressly stated as the grounds on which the courts in many instances have declared that dividends are not apportionable: *Foote, appellant*, 22 Pick. 304; *Granger v. Bassett*, 98 Mass. 468; *Earp's will*, 1 Para. 453; S. C., 28 Pa. St. 368; *In re Maxwell's trusts*, 1 Hem. & Mil. 610; *Clive v. Clive*, Kay, 600; *Clapp v. Astor*, 2 Ed. Ch. 379. The time when the profits of the corporation's business were realized is not regarded in determining to whom the dividends should be paid, *Field on Corp.*, sec. 104, in the absence of any statutory enactment, or provision in the deed of settlement or by-laws: *Dexter v. Phillips*, 121 Mass. 180. And, as a general rule, it may be laid down that dividends in a corporation are not apportionable, but that they belong to the owner of the shares when they are declared payable: 1 Williams on Exrs., sec. 836, note m; *Goodwin v. Hardy*, 57 Me. 145; *Brundage v. Brundage*, 60 N. Y. 551; *March v. Railroad*, 43 N. H. 520, where Sargent, J., makes this clear statement: "The purchaser of a share of stock in a corporation takes the share with all its incidents, and among these is the right to receive all future dividends; that is, its proportionate share of all profits not then divided, and as we understand the law and the usage of such corporation, it is wholly

immaterial at what times, or from what sources, these profits have been earned; they are an incident to the share to which a purchaser becomes at once entitled, provided he remains a member of the corporation until a dividend is made: *Harris v. Stevens*, 7 N. H. 454; *Hagar v. Dandeson*, 2 Exch. 741."

JENKINS v. CLEMENT.

[1 HARPER'S EQ. 72.]

DEVISE IN FEE.—Words of inheritance or of perpetuity are not essential in a devise to pass the fee.

VOLUNTARY SETTLEMENT made after marriage is void as against prior creditors; so if one, not then indebted, settles his property after marriage, and soon after contracts large debts, so as to manifest an object to cover up his property, the settlement will be held void.

VOLUNTARY SETTLEMENT, WHO MAY HAVE RELIEF AGAINST.—Where a trustee then little indebted made a post-nuptial settlement of his property on his wife, and subsequently became insolvent, and squandered the trust estate, it was held that the beneficiaries of the trust were entitled to have the settlement vacated.

THE bill was filed to obtain a construction of a devise in the will of Edward Wilkinson, deceased, a brother of the defendant, Mrs. Clement, and to set aside a settlement made for her use by her late husband, Wm. Clement. In March, 1801, Wm. Clement conveyed to the defendant, Charles S. Deas, a plantation devised to him by his brother-in-law, Wm. Wilkinson, and also twenty-five slaves which he had received with his wife on marriage, to hold in trust for his said wife. He was then in debt, but for a trifling amount only; and he remained in good credit for about four years thereafter. In and subsequently to January, 1802, Clement, as executor of Edward Wilkinson, sold certain lands for the benefit of his nephews and nieces. He never accounted for the proceeds, and they, therefore, instituted this suit. The other facts are stated in the opinion of the chancellors.

Chancellor Gaillard refused to set aside the settlement. The complainants appealed.

Desaussure, for the complainants. A devise without any words of inheritance or perpetuity, gives an estate for life only: 6 Cruise Dig. 304; 1 Bridg. Dig. 535. William Clement was indebted when he made the settlement; it was void as against existing creditors, and if void as to them, is not valid against subsequent creditors: *Reid v. Livingston*, 3 Johns. Ch. 481. *Battersbeer v. Farrington*, 1 Swan, 106; *Montacute v. Maxwell*, 1

P. Wms. 618. A trustee cannot settle property so as to shield him from a breach of trust.

Petigru, Axon and Hunt, contra. Upon the construction of the devise, cited *Holdfast v. Martin*, 1 T. R. 411; *Doe v. Richards*, 3 Id. 356; *Frogmorton v. Wright*, 3 Wils. 414; *Denn v. Gaskin*, Doug. 760. A voluntary settlement, if not fraudulent, is valid: 9 Ves. 193; *Lush v. Wilkinson*, 5 Id. 384.

DESAUSSURE, Chancellor. Two very distinct questions occur in this case: The first is on the construction of the will of the late Mr. Edward Wilkinson. The second is as to the validity of the marriage settlement of the late Mr. William Clement. The words of the devise which are to be construed are as follows: "I devise my plantation at Willtown, called the Island River plantation, to my brother-in-law William Clement." There are no words of inheritance or of perpetuity in this devise. The representatives of Mr. William Clement claim the property as a devise in fee. This is denied by the complainants. The circuit court was of opinion, and so decreed, that the decided cases in this court had settled the doctrine that words of inheritance or of perpetuity were not necessary in last wills and testaments, and that, therefore, Mr. Clement took a fee under this devise. I have considered this case, and agree in opinion with the circuit court, that the decisions heretofore made have settled this doctrine. I allude to the cases of *Whaley v. Jenkins*, 3 Eq. Rep. 80; *Clark v. Mikel*, Id 168; *Waring v. Middleton*, Id. 249. It seems scarcely necessary, after those cases, to examine the subject further. But I will add a few words. It is well known that many of the judges in England have regretted the rigor of the rule which required words of inheritance or perpetuity to give a fee in devises of real estate. For it is notorious that the rule tended to defeat the intention of the testator in nine cases out of ten at least. But the anxious desire of the law and the courts to watch over the interest of the heir at law introduced another rule, that the heir at law was never to be disinherited, but by express words or plain and necessary implication. That rule produced a perpetual struggle between the two principles, the duty of giving effect to the wills of testators, and the desire to favor the heir at law, the main support of the landed aristocracy. Since the abolition of the rights of primogeniture, which flowed naturally and necessarily from the nature of our government, we have no such contending principles existing in our system. Equality of rights is equity, politically as well as

morally. It is the duty of the court to endeavor in the construction of wills to ascertain the intention of the testator, and to give effect to that intention, without regard to technical phraseology. In the case before us, the words of the will gave the land unqualifiedly to Mr. Clement, and I have no doubt that the testator intended to give a fee-simple. I have no doubt, because in all such cases the testator would limit the estate for life or years, if he so intended. He makes no further disposition of the property, as he would have done if he had not meant to give a fee. Believing, then, that he meant to give a fee, I feel bound to give effect to that intent, notwithstanding the absence of words of inheritance or perpetuity. And the decided cases warrant our giving effect to that intention.

We come next to consider the question of the effect of post-nuptial settlement made by Mr. Wm. Clement of his property. He acquired the land under the will of his brother-in-law; the slaves on his marriage with his wife; and he had little or no other property. He made a marriage settlement subsequent to his marriage, including all the property so acquired. He appears to have been in debt at the time of the execution of the said instrument. These debts were, however, small, and very far short of the value of the property settled. It is contended for the complainants that the settlement is void; and that the property should be subjected to the payment of Mr. Clement's debts. It must be remembered here that though Mr. Clement died deeply in debt, there are no creditors before the court seeking relief against the settlement except the complainants, who are legatees of Mr. Edward Wilkinson. He devised certain tracts of land to be sold, and the proceeds to be divided among these nephews and nieces. It appears that Mr. Clement, who qualified as executor on the will, sold these lands, and received and spent the proceeds, and has died insolvent; so that they will lose their legacies unless the settled property be subjected to the payment.

It is doubtless true that a voluntary settlement, made after marriage, cannot be sustained against prior creditors. They must be paid out of the property so settled. And it is equally true that when a man settles all his property after marriage, and soon after contracts large debts, so as to manifest that the object of the party was to cover his property and then to incur debts without the means of paying them, the instrument will be void. For this raises a vehement presumption of fraud, and the settlement will not be supported. The circumstances of this case, if they do not actually warrant the conclusion of a

fraudulent intent, operate as a legal fraud. The property in question came to Mr. Clement wholly from his wife and her brother, and he was under a moral obligation to make a provision for his wife and her children, provided he did no injustice to others. His debts were not contracted immediately after the settlement, but gradually and in lapse of years; and Mr. Clement's failure arose partly from losses on friendly indorsements. I am unwilling, therefore, under these circumstances, to say that the marriage settlement was made expressly with a view to deceive or defraud general and subsequent creditors; and with respect to ordinary debts contracted after the settlement, I am inclined to think they would not be allowed to defeat the settlement, which was regularly recorded.

But it does appear to me that the facts of this cause make a very strong case for relief to these complainants, which may be given in perfect conformity to the principles above stated. The testator, Mr. Edward Wilkinson, after devising the tract of land at Willtown, called the Island River Swamp plantation, to Mr. William Clement, devised three other tracts of land to be sold by his executors, on the best terms they could obtain, most conducive to the interest of those concerned; and then directed the moneys arising from the sale of the said three tracts of land to be equally divided, share and share alike, among his, the testator's, nephews and nieces, the issue of his sisters who were born at the time of making the will, or might be born within four months from the date of the will; with right of survivorship, in case of the death of any of the said nephews and nieces, unmarried, or without making a will. Mr. Clement was named an executor, and accepted the devise to himself. He also qualified on the will as an executor, and undertook the trust committed to the executors, to sell the other lands for the benefit of the testator's nephews and nieces. In fact, he alone afterwards acted in the sale of the lands, and received the money in trust for them. This money it is admitted he has spent, and is dead, insolvent; so that the nephews and nieces can receive nothing unless protected from the operation of this post-nuptial settlement. On the maturest deliberation, I think they are entitled to that protection. Why are post-nuptial settlements constantly declared void as to antecedent debts? Certainly not because those debts have any liens on the property comprehended in the settlement; for such settlements are declared void as to antecedent debts, whether secured by mortgages or judgments, or whether owing on bonds or

notes not yet due. They are avoided, then, because of the pre-existing engagements of the husband at the time he makes the post-nuptial settlement; and because of the moral as well as legal obligation to comply with those engagements before he puts his property out of the way of making them good. Now I consider the acceptance by Mr. Clement of the trust, under the will of Mr. Wilkinson, for the benefit of the nephews and nieces, and his holding the property under said trust, as an existing engagement at the time of executing the post-nuptial settlement, which he was bound to fulfill. He has not done so. He sold the land, received the money, spent it, and left no estate to pay the nephews and nieces, except that comprehended in the post-nuptial settlement. I do not think he had any more right to cover his property by a post-nuptial settlement against this trust, then existing, and the property in his hands, than he had to protect it by such an instrument against any other pre-existing engagement, such as a bond or note. The conclusion then is, that the post-nuptial settlement is void against the claims of the complainants.

It is therefore ordered and decreed that the decree of the circuit court be affirmed as to the devise, and reversed as to the marriage settlement, and that it be referred to the commissioner to examine and report what sales of the lands devised and sold for the benefit of the nephews and nieces were made by Mr. Clement, and for what sums of money; and that the property comprehended in the post-nuptial settlement be held liable to the payment of the sums which may be found due; and also that the commissioner do inquire into and report what nephews and nieces, or their representatives, are in existence to receive and share the amount so due.

THOMPSON and JAMES, Chancellors, concurred.

GAILLARD, Chancellor. I concur in the opinion of the circuit court in those parts in which is affirmed, for the reasons assigned in it.

WATTES, Chancellor. I concur in affirming the decree of the circuit court in this case in the construction of the will of E. Wilkinson, on the grounds taken in the present decree; but I differ from the majority of the court in the construction of the settlement of W. Clement, for the reasons stated by Judge Gaillard in his separate opinion, which I have also signed.

GAILLARD, Chancellor, dissenting. It is said that although the settlement be good as to subsequent debts, it is void as to

the demands of the complainants, as they are entitled under the will of Mr. Wilkinson to the proceeds of lands ordered by him to be sold by his executors, and which were sold by Mr. Clement as such, and who received and never accounted for them. I do not consider the claim as at all analogous to a debt existing at the time of settlement; it is true the trust then existed, but the breach of trust or fraud, should that be imputed to Mr. Clement, was long subsequent, and until the one or the other was committed he incurred no liability. The settlement in no wise affected the interests of the complainants at the time of its execution. It was a fair transaction, and its original character could not be altered by subsequent events. The claim of the complainants can only be sustained by giving to the conduct of Mr. Clement, after the settlement, a retrospective effect by connecting his breach of trust with its acceptance, and considering the time of the acceptance as that of the existence of their claim; but this cannot be, for the deed being valid when it was executed, rights were instantly acquired under it, and these were entirely beyond the control of Mr. Clement, and no act of his could prejudice them; nor can the settlement be considered as subject to the trust, since the acceptance of a trust does not give to the *cestui que trust* an equitable lien on the estate of his trustee. Mr. Clement rendered himself personally liable for any breach of trust he may have committed, but its consequences cannot be visited on the property contained in the settlement.

WATIES, Chancellor. I concur in the construction given to the settlement by Judge Gaillard.

A VOLUNTARY CONVEYANCE OF LAND IS BINDING as between the parties thereto, their heirs and devisees: 3 Wash. Real Prop. 335, 4 ed.; *Reichart v. Castator*, 6 Am. Dec. 402, and note; S. C., 5 Binn. 109; *Eyrick v. Hetrick*, 13 Pa. St. 491; *Dyer v. Homer*, 22 Pick. 253; *Byrd v. Curlin*, 1 Humph. 466; *Randall v. Phillips*, 3 Mason, 373, 388; *McGuire v. Miller*, 15 Ala. 394, 397; *Salmon v. Bennett*, 7 Am. Dec. 237, and note; S. C., 1 Conn. 525; *Doe v. Hurd*, 7 Blackf. 510; *Bullitt v. Taylor*, 34 Miss. 708, 737; *Lerow v. Wilmarth*, 9 Allen, 386; *Mercer v. Mercer*, 29 Iowa, 557; *Sexton v. Wheaton*, 8 Wheat. 229; and their representatives: *Jackson v. Garnsey*, 16 Johns. 189; and cases above cited. The statute under which fraudulent and voluntary conveyances are set aside: 27 Eliz. ch. 4, does not apply to the parties to those instruments, nor their representatives. In *Jackson v. Garnsey*, *supra*, it is said, Spencer, C. J., speaking for the court, that: "As between the parties they are expressly excluded from its operation, and are left as they stood at the common law; and before the statute the heir could never set up his title against the voluntary alienee of his ancestor, nor call upon him for contribution where both were amenable to the creditors of the ancestor as

terre-tenants; nor will courts of equity assist the party making a voluntary conveyance or his representative claiming as such by setting it aside."

Notwithstanding it is ordinarily said by the courts that voluntary conveyances bind the parties thereto, "and their representatives," it is very generally held, and may be considered as settled that a voluntary conveyance is not binding upon the executor or administrator of a voluntary grantor where it is not binding upon the creditors of the grantor. The personal representative represents the creditors as well as the decedent, and is not only entitled, but bound, to follow assets that should be applied in satisfaction of the creditors' claims. Where creditors may avoid a voluntary conveyance, the executor or administrator of the debtor may do so also. The authorities in support of these propositions are collected in the note to *Ewing v. Handley*, ante, 140.

EFFECT OF VOLUNTARY CONVEYANCE—CREDITORS.—In examining the force and validity of a voluntary conveyance upon persons other than the parties thereto, it will be necessary to consider first the position of creditors of the grantor, and secondly that of subsequent purchasers. Creditors resolve themselves into two classes—those whose claims were in existence at the time of the conveyance, and those to whom the grantor became indebted at a time posterior to the conveyance. In regard to existing creditors, there prevails in this country two lines of decisions upon their right to follow property of their debtor which he has voluntarily conveyed. The one holds that a voluntary conveyance of realty by a man indebted at the time is of itself a fraud upon his creditors, no matter how innocent or meritorious the motive with which the conveyance was made, or how inconsiderable the part of the grantor's property disposed of. Such is the doctrine prevailing in Alabama: *Miller v. Thompson*, 3 Port. 196; *Spencer v. Godwin*, 30 Ala. 355; *Crawford v. Kirksey*, 55 Id. 282, 292, where the rule is announced with the comment, "Debtors must be just before they are generous, has been the life-time language of this court." In West Virginia, under a statutory provision of the code of Virginia of 1849, no doubt adopted to put at rest the previous conflict in that state upon this subject, it is settled as to previous or existing creditors, that "a voluntary conveyance which interferes with or breaks in upon the rights of existing creditors will not be permitted to take effect to the prejudice of their just demands, but as to such creditors is absolutely void, without regard to the amount of the debts, the extent of the property so conveyed, the motives that prompted the settlement or the condition, and circumstances of the grantor at the time it was made:" *Lockhard v. Beckley*, 10 W. Va. 87, 101. In Kentucky a voluntary conveyance made at a time when the grantor was indebted, is presumed to be fraudulent as a conclusion of law, as regards the creditors: *Hanson v. Buckner*, 4 Dana, 251. But the language of this decision has been liberally construed, thereby placing the rule of this state in harmony with that of the majority of the courts: *Dukme v. Young*, 3 Bush, 350. The Illinois rule is that a voluntary conveyance, as against pre-existing creditors, is fraudulent in law and void: *Emerson v. Bemis*, 69 Ill. 540. But in stating the rule the court revert to a qualification in relation to existing creditors, where the circumstances of the indebtedness and of the conveyance repel any possible imputation of fraud, as where the conveyance is of a small property by a person of great wealth, whose debts bear a very small proportion to his actual means. The statement of this limitation goes far to bring the case within the rule adopted by the majority of the authorities, and merely serves to shift the burden of proof upon the shoulders of the grantor to show his *fides* and ability to pay his debts. New

Jersey recognizes the same rule: *Annin v. Annin*, 24 N. J. E. (9 C. E. Gr.) 184. And in South Carolina, *Richardson v. Rhodus*, 14 Rich. 96, a voluntary conveyance is declared by law to be fraudulent and void. There is an exception made in this decision, in favor of a conveyance where the indebtedness is slight, or the debts are inconsiderable compared with the value of the donor's estate, and the creditor by his laches has allowed the reserved estate to be wasted.

The states holding a voluntary conveyance fraudulent in law as to existing creditors are few in number. Their late adjudications proceed upon the maxim of *stare decisis*, and their early decisions founded upon a generally admitted misconstruction of the statute of Elizabeth, are ill suited to the growing mercantile interests of the country, and to the duty of a man to provide for those dependent upon him. A conveyance fraudulent in law as regards existing creditors would be fraudulent as to subsequent creditors, there being creditors when the deed was executed, fraud vitiating everything; and such is the decision of the courts in the above citations.

Much of the diversity of opinion and uncertainty upon this entire subject can be traced to the case of *Reade v. Livingston*, 3 Johns. Ch. 481 [8 Am. Dec. 520], where Chancellor Kent, after an exceedingly elaborate consideration of the Stat. of Eliz., concluded that a voluntary marriage settlement after marriage, was, of itself, void as to existing creditors. Although this decision was departed from in *Seward v. Jackson*, 8 Cow. 406; and the whole matter was settled by statute in New York, other states have followed the learned chancellor.

VOLUNTARY CONVEYANCE NOT FRAUDULENT PER SE.—It is the settled rule in the majority of the states of the Union that a voluntary conveyance is not, for that reason alone, fraudulent: *Lerow v. Wilmarth*, 9 Allen, 386; *Pease v. Croan*, 51 Ind. 336; *Gwyer v. Figgins*, 37 Iowa, 517; *Wilson v. Cohlheim*, 46 Miss. 346; *Arnett v. Wanett*, 6 Ired. 41; *Thacker v. Saunders*, Bush. Eq. 145; *Seward v. Jackson*, 8 Cow. 406; *Holden v. Burnham*, 63 N. Y. 74, 76; *Harlan v. Barnes*, 5 Dana, 220; *Place v. Rhem*, 7 Bush, 588; *Grant v. Ward*, 64 Me. 239; *Warner v. Dove*, 33 Md. 579; *Brice v. Myers*, 5 Ohio, 121; *Posten v. Posten*, 4 Whart. 27; *Greenfield's Estate*, 14 Pa. St. 489; *Clark v. Depew*, 25 Id. 509; *Hester v. Wilkinson*, 6 Humph. 215; *Nicholas v. Ward*, 1 Head, 323; *Brackett v. Waite*, 4 Vt. 389; *Dewey v. Long*, 25 Id. 564; *Hozie v. Price*, 31 Wis. 82; *Smith v. Fodges*, 92 U. S. 183. The sentiment of these cases is well expressed in *Lerow v. Wilmarth*, *supra*, by Chief Justice Bigelow: "We do not wish to be understood as giving our sanction to the doctrine that a voluntary conveyance by a father for the benefit of his child is *per se* fraudulent as to existing creditors, although shown not to have been fraudulent in fact, and is liable to be set aside, because the law conclusively presumes it to have been fraudulent, and shuts out all evidence to repel such presumption. The better doctrine seems to us to be that there is, as applicable to voluntary conveyances made on a meritorious consideration, as of blood and affection, no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made, but that such a conveyance, under such circumstances, affords only *prima facie* or presumptive evidence of fraud, which may be rebutted and controlled. Such seems to have been the rule heretofore adopted by this court: *Norton v. Norton*, 5 Cush. 524; *Thacher v. Phinney*, 7 Allen, 146; *Beal v. Warren*, 2 Gray, 447, and as established by the weight and force of reasoning in the text-writers, and best considered cases in this country: *Hinde v. Longworth*, 11 Wheat. 199; *Verplank v.*

Sterry, 12 Johns. 536, 559 [7 Am. Dec. 348]; *Seward v. Jackson*, 8 Cow. 406, 423, 434, 438; 4 Cruise Dig. (Greenl. ed.), tit. XXXII, c. 28, sec. 15, note; 2 Kent Com. 440, 442, notes; 1 Story on Eq., secs. 361, 365."

EXISTING CREDITORS.—In ascertaining whether a voluntary conveyance is a fraud upon existing creditors, it is the established principle of the preponderance of authorities to consider the condition of the donor at the time of the conveyance. The exceptional cases affirm that the existence of any indebtedness, irrespective of amount or ability to pay, will avoid a transfer of one's property without a valuable equivalent. The decisions ruling in number, hold that the amount of the donor's indebtedness, the sufficiency of the residue of his property to meet the same, the proportion the estate conveyed bears to the bulk of his possessions, are all to be weighed in determining upon the effect of a voluntary disposition of realty, where no positive fraudulent motive appears. If, at the time of the conveyance, the donor have sufficient assets remaining to discharge any existing claims against him, the conveyance will be valid: *Gridley v. Watson*, 53 Ill. 193; *Stewart v. Rogers*, 25 Iowa, 375; *Winchester v. Charter*, 97 Mass. 140; S. C., 102 Id. 272; *Miller v. Pearce*, 6 W. & S. 101; *Salmon v. Bennett*, 7 Am. Dec. 237; *French v. Holmes*, 67 Me. 186. And a creditor cannot come upon the lands conveyed away, although the debtor, by subsequent speculations, may have lost all of his remaining property.

On the other hand, where a voluntary conveyance is made by one largely indebted and in embarrassed circumstances, of all his property, or of so much as does not leave enough to pay existing demands upon him, these facts will raise a *prima facie* case of fraud, which the debtor must rebut. And if it appear that there is not sufficient property to satisfy the executions of the then creditors, the conveyance will be declared void: *Winchester v. Charter*, 97 Mass. 140; *Redfield v. Buck*, 35 Conn. 328; *Vertner v. Humphrey*, 22 Miss. 130; *Cowen v. Alsop*, 51 Id. 158; *Gruber v. Boyles*, 1 Brev. 266; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Bongard v. Block*, 81 Ill. 186; *Grimes v. Russell*, 45 Mo. 431; *Chase v. McCoy*, 21 La. Ann. 195; *Delashmut v. Trau*, 44 Iowa, 613; *Pratt v. Curtis*, 2 Low. 87, 90. The propositions deduced from the cases by Judge Lowell, in the last citation, represent the prevailing opinion. They are: 1. A voluntary conveyance to a wife or child is not fraudulent *per se*, but it is a question of fact in each case, whether a fraud was intended; 2. Such a deed, made by one who is considerably indebted, is *prima facie* fraudulent, and the burden is on him to explain it; 3. This he may do by showing that his intentions were innocent, and that he had abundant means, besides the property conveyed, to pay all his debts.

The question of intent on the part of the donor is not decisive; it is not his *bona fides*, but the injury to those to whom he is legally indebted that governs the validity of the voluntary transfers of property. A man may give his property to his wife or children in the belief that he has a right to do so; but if thereby his then creditors are hindered or delayed, the conveyance will be set aside: *Winchester v. Charter*, *supra*; *Potter v. McDowell*, 31 Mo. 62; *Patten v. Casey*, 57 Id. 118.

SUBSEQUENT CREDITORS.—In regard to creditors whose claims did not attach until after a voluntary conveyance was made, it is a well-settled principle that to entitle them to set aside the conveyance there must have been an intention on the part of the debtor to defraud his creditors: *Mattingly v. Nye*, 8 Wall. 370; *Lloyd v. Bunce*, 41 Iowa, 660; *Winchester v. Charter*, 12 Allen, 506; *Trafton v. Hawes*, 102 Mass. 541; *Lornmore v. Campbell*, 60 Barb. 62; *Pratt v. Myers*, 56 Ill. 24; *Churchill v. Wells*, 7 Coldw. 364; *Wilcoxon v. Morgan*, 2

Col. T. 473. It is not necessary that the debtor should convey away his property to prevent its being taken by future creditors in order to enable them to attack the conveyance for fraud; it is sufficient if there be fraud upon existing creditors. Such fraudulent conduct renders the transfer void *in toto*, except as to the parties, and of this invalidity a subsequent creditor may take advantage as well as one whom the debtor intended to defraud.

An able exposition of the law in this regard, and one to which frequent reference is made, is given in *Winchester v. Charter*, 12 Allen, 606, by Chief Justice Bigelow, as follows: "On the one hand, it could not be properly adjudged that a voluntary conveyance was fraudulent and void, either as against existing or subsequent creditors, if it was proved to have been made by a person substantially free from debt, and possessed of a large amount of property, who had no purpose to hinder or delay the creditors, and whose sole motive was to transfer the property for the benefit of the wife or children, so that it should not remain at the hazard of business, or be subjected to the risk of improvidence. On the other hand, it would be very clear that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate or barely sufficient for the payment of his debts, would furnish strong presumptive evidence of fraud; and if unexplained, would be set aside as void against creditors. Nor would this presumption of fraud be confined to pre-existing creditors. It would be equally strong as to those whose debts were subsequently contracted, because a transfer of property under such circumstances affords a reasonable ground of presumption that the intent with which it was made was to put beyond the reach of creditors, future as well as present, the fund or capital to which they had a right to resort for the payment of their debts. Whenever, therefore, no actual fraud or express intent to hinder and delay creditors is proved, it is necessary to show that a grantor at the time of making a voluntary conveyance was indebted beyond his probable means of payment remaining after the conveyance in order to lay the foundation for the inference that it was made with a fraudulent design. It was in this sense that it was said in *Thacher v. Phinney*, 7 Allen, 146, 150, that in order to avoid a voluntary conveyance as to subsequent creditors, it would be important to show that it was fraudulent as to existing creditors; otherwise in the absence of other evidence of intent, it would be difficult to establish a valid ground for the presumption that the transfer was made with a view to hinder and delay subsequent creditors. But it by no means follows that a voluntary conveyance cannot be set aside by subsequent creditors unless it be shown to have been made in fraud of the rights of pre-existing creditors. If such were the rule of law, it would put beyond the reach of creditors whose debts were contracted subsequent to a voluntary conveyance property which was transferred fraudulently and collusively, with an express intent to deceive and defraud them; but it is perfectly well settled that if there be any design of fraud or collusion or any intent to deceive third persons in making a voluntary conveyance, although the grantor be not indebted, the transfer will be voidable by subsequent creditors. In such cases the conveyance is made *mala fide*, and cannot be upheld in derogation of the claims of creditors: *Reade v. Livingston*, 3 Johns. Ch. 481; *Bennett v. Bedford Bank*, 11 Mass. 421; *Damon v. Bryant*, 2 Pick. 411; *Parkman v. Welch*, 19 Id. 231, 237; Story on Sales, sec. 513, and cases cited in note."

An inference of fraudulent intent to delay or hinder subsequent creditors will arise *prima facie* from the proof of intent to defraud existing creditors: *Winchester v. Charter*, *supra*; *Horn v. Volcano Water Co.*, 13 Cal. 62. Or where a man makes settlement of his property upon his wife immediately

prior to engaging in an extensive or hazardous business: *Smith v. Vodge*, 92 U. S. 183; *Williams v. Davis*, 69 Pa. St. 21, 28. And to raise the presumption of fraudulent intent it is not necessary to prove that the grantor intended to contract any particular debt or debts. It will be sufficient if the evidence satisfy the jury that there was an intent on the part of the grantor to contract debts, and a design to avoid payment of them by the conveyance of his property: *Winchester v. Charter*, 12 Allen, 611. This fraudulent intent which the courts require in order to permit a subsequent creditor to impeach a prior voluntary conveyance, is distinguished in New Jersey, where such conveyances are held *per se* void as to existing creditors. In *Annin v. Annin*, 9 C. E. Gr. 184, and in *Belford v. Crane*, 1 Id. 265, it is said that in the case of existing creditor the fraudulent intent is a question of law; whereas, in the case of subsequent creditors it is one of fact.

SUBSEQUENT PURCHASERS.—The constructions of the statute of 27 Eliz., when applied to the case of subsequent purchasers have been as conflicting as the decisions in regard to the rights of existing and subsequent creditors. In England the law is settled that a subsequent purchaser from one who has previously conveyed the land voluntarily, will hold as against such donee, whether such purchaser had notice or not of the prior conveyance. This ruling is based on the theory that the subsequent transfer for value raises a conclusive presumption of fraud in the voluntary conveyance. This view of the law is not generally followed in this country. It is expressly repudiated in *Beal v. Warren*, 2 Gray, 456, after a comprehensive analysis of the statute of 27 Eliz. The conclusion of the reasoning of the court in that case is: "The true construction of the statute we think is, that conveyances are not avoided merely because they are voluntary, but because they are fraudulent; that a voluntary gift of real estate is valid as against subsequent purchasers, and all other persons, unless it was fraudulent at the time of its execution; that a subsequent conveyance for a valuable consideration is evidence, but by no means conclusive evidence, of fraud in the first voluntary conveyance; and that a voluntary gift made when the grantor is not indebted, in good faith, and without intent to defraud future creditors, or subsequent purchasers, is good as against a subsequent purchaser for a valuable consideration with notice. Such we understand to be the construction practically adopted in this commonwealth, and which is, to use the words of Chancellor Kent, 'the better American doctrine:' 4 Kent Com. 6th ed., 463, note; *Bennett v. Bedford Bank*, 11 Mass. 421; *Ricker v. Ham*, 14 Id. 137; *Salmon v. Bennett*, 1 Conn. 525 [7 Am. Dec. 237]; *Cathcart v. Robinson*, 5 Pet. 280; *Jackson v. Town*, 4 Cow. 603; 1 Story's Eq., sec. 427 *et seq.*; 1 Cruise Dig., Greenl. ed., tit. 7, c. 2, sec. 7, note; 1 Am. L. Cas., 3d ed., 78."

That a fraudulent voluntary conveyance is void as against a subsequent *bona fide* purchaser, even with notice, is laid down in *Wyman v. Brown*, 50 Ma. 148, citing among other cases, *Wadsworth v. Havens*, 3 Wend. 411; and *Hudnal v. Wilder*, 4 McCord, 295. And in the absence of any actual fraud, the recording of a voluntary deed is sufficient constructive notice to bind a subsequent purchaser of the land from the donor: *Cooke v. Kell*, 13 Md. 492.

A clear summary of the various questions arising upon this branch of the subject, and one in harmony with the American doctrine, is given in the recent decision of *Laird v. Scott*, 5 Heisk. 347, as follows: "After registration of a voluntary deed for land, a subsequent purchaser for value cannot claim to be an innocent purchaser without notice. But if the voluntary conveyance was intended to defraud a subsequent purchaser, the notice by registration will not affect his right to attack the voluntary conveyance for actual fraud.

It follows that a voluntary conveyance made with the intent to defraud a subsequent purchaser for value is void as against him, with or without registration, and with or without notice. A voluntary conveyance, not proven and registered will be held as fraudulent against a subsequent purchaser, unless such subsequent purchaser had actual notice of the prior conveyance. If a voluntary conveyance be made without fraud and is registered, it will prevail against a subsequent purchaser, whether such purchaser had actual notice or not of the prior conveyance."

The various decisions bearing upon this question will be found collated in the note to *Sexton v. Wheaton*, 1 Am. L. Cas. 36.

COHEN v. DUBOSE.

[1 HARPER'S EQ. 102.]

MISTAKE IN VERDICT, RELIEF IN EQUITY.—Equity will relieve against a mistake in a verdict by which the jury omitted to give interest.

THE bill stated that complainant brought an action against defendant to recover two hundred and forty-four dollars and interest, due on a promissory note; and that the jury gave a verdict for complainant, but omitted the interest by mistake. At the trial two of the jurors were sworn, and their testimony sustained the allegations of the bill regarding the mistake. In the subordinate court the following opinion was given:

WATTS, Chancellor. It would be a great reproach to the administration of justice if there was no relief for such a case. But I am satisfied that this court is not only competent to give relief, but is authorized to do it on parol evidence of the mistake. The general authority of a court of equity in cases of mistake has never been doubted. In *Langley v. Brown*, 2 Atk. 203, Lord Hardwicke says: "Mistake and misapprehension in the drawers of deeds, contrary to the design of the parties, are as much ahead of relief as of fraud." And in *Henkle v. The Royal Exchange Assurance Co.*, 10 Ves. 317, he again says: "There is no doubt the court has jurisdiction to relieve in respect of a plain mistake:" See, also, 1 Ves. & Beams. 168. It is contended, however, that it has no right to interfere with a verdict. I can find no authority for such an exception, and I can see no reason for it. The ground for relief in any case of mistake is that injustice will be done if the mistake be not rectified, and it is immaterial whether it has occurred in a verdict or in a deed. In the *Countess of Gainsborough v. Gifford*, 2 P. Wms. 420, the master of the rolls says: "There are cases in which equity relieves after verdict in a matter where the defend-

ant at law might have defended himself; as where after a plaintiff has recovered a debt at law, the defendant finds a receipt for the money in question; so if the plaintiff's own book appears to be crossed, and the money paid before the action.

Lord Hardwicke declares the same thing in *Williams v. Lee*, 3 Atk. 224. The relief in those cases might indeed have been given on the ground of fraud, for it may be presumed that the plaintiff knew he had been paid; but it cannot be doubted that relief would also be given on the ground of mistake, as where the verdict was obtained by an executor, who would not be obnoxious to the presumption of fraud. There would be the same reason for the interposition of equity in both cases, for the prevention of injustice, which is the governing principle, would apply to both. This appears to be a good ground for relief against a decree. In the case of the *East India Co. v. Boddman*, 13 Ves. 42, application was made for a rehearing of a decree given by the master of the rolls, which had been affirmed there afterwards by the chancellor. Lord Eldon refused the application, because the error imputed to the decree had been before brought fully before the court, and the judgment ought, on that account, to be final. But he added: "This rule, like all others, is open to an exception, which scarcely ought to be called an exception, as it does not clash with the principle of the rule. I mean where there is a manifest mistake."

But it is further objected that the mistake here has been proved by parol evidence, and that this is not admissible to alter the verdict. The rule of evidence on this subject is certainly a wise one; a written instrument cannot be added to or varied in any way by parol evidence; but it would be subversive of justice if this rule were so inflexible as to exclude the only mode of proving generally a fraud or mistake in a written instrument. Such evidence, however, has been received with great caution in cases of mistake. "This," says Lord Thurlow, in *Irnham v. Child*, 1 Bro. C. C. 93, "ought to be proved as much to the satisfaction of the court as if it were admitted." But he says in *Shelburne v. Inchiquin*, Id. 344, "It is impossible to refuse as incompetent parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties." He adds: "To be sure it must be strong, irrefragible evidence; but I do not think I can reject it as incompetent." And Chancellor Kent, who has thor-

oroughly examined the subject in the case of *Gillespie v. Moon*, 2 Johns. Ch. 596 [7 Am. Dec. 559], has thus expressed the result of his examination: "I have looked into most, if not all, the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had on any deed founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defense."

But the admission of parol evidence by this court in the case of a mistake is not considered as any deviation from the rule of law; it is not used to contradict or vary the sense of the written instrument, but to prove a distinct and collateral matter which furnished an equity *dehors* the instrument; and this is the ground taken in all the cases. Lord Thurlow, in *Shelburne v. Inchiquin*, says: "It must be an essential ingredient to any relief under this head, that it should be on an accident perfectly distinct from the sense of the instrument." And in *Irnham v. Child*, he was of opinion that in rectifying a mistake "the court could not overturn the rule of evidence by varying the deed, but that it would be an equity *dehors* the deed." The present case is evidently one of that nature; it is not attempted to contradict or vary the sense of it in any way; the ground of complaint is, that the jury have by mistake omitted to provide for a part of plaintiff's demand which they could not intend to exclude, as it was a legal right not disputed by the defendant. This is a distinct fact perfectly consistent with the verdict, which has not been denied by the answer, although it has not been admitted, and has besides (in the emphatic language of Lord Thurlow) been proved "as much to the satisfaction of the court as if it were admitted."

The last ground insisted on for the defendants is, that the complainant had a complete remedy at law. I think it very probable that he might have had a new trial on the evidence of Mr. Evans; but this is by no means certain, and as the subject is more properly cognizable by this court and the remedy here more certain than at law, I feel bound to entertain the bill and give the relief prayed for. It is, therefore, ordered and decreed that the commissioner do take an account of the interest due on the promissory note on which the complainant recovered the principal by verdict at law, and the defendant to pay the amount of the said interest to the complainant.

From this decree the defendant appealed, on the grounds that

the court could not correct such mistake in a verdict; and that if it had power to do so, parol evidence was inadmissible to show what the jury intended.

Evans, for the appellant, contended that the jury might have committed an error, but that they had made no mistake such as equity would correct, and insisted that it was very dangerous to admit the testimony of jurors concerning what they intended to give by their verdict: 1 Madd. 41; 1 Bridg. Dig. 375; 2 Vern. 3.

Miller, contra.

WATIES, Chancellor. On a full examination of this case, we are of opinion that the decree of the circuit court should be affirmed. In further support of the authority relied on may be the case of *Groemes v. Stritho*, 2 Dickens, 469, in which relief was given on a mistake in a verdict; and it also appears that the mistake here was not discovered until it was too late for the complainant, by the rules of the constitutional court, to apply for a new trial.

It is further ordered and decreed that the decree of the circuit court be affirmed.

DESAUSSURE and JAMES, Chancellors, concurred.

MILLER v. TOLLISON.

[1 HARPER'S EQ. 145.]

IMPEACHING CREDIBILITY OF DEFENDANT.—If a defendant files a verified answer in equity, evidence may be received to impair the force of the answer as evidence, by showing that he is unworthy of belief.

SOLE TRADER.—A husband may lawfully, by deed, constitute his wife a sole trader; but, if made a sole trader while the husband's affairs are embarrassed, and if she pursues no separate business, but purchases valuable property, she is bound to show from what funds she made the purchases, or they will be declared fraudulent and subjected to the satisfaction of her husband's creditors.

DEED—PARTLY FRAUDULENT.—If a deed is made to secure an honest debt, and also to cover up the property from creditors, it will not be allowed to stand as security for the amount due.

The facts are stated in the opinion of the chancellors.

DESAUSSURE, Chancellor. The bill in this case was filed by a creditor of Muse Tollison to set aside the sale and purchases of certain slaves, furniture, lands and dwelling-house of said Tollison, on the allegation that they were made covinously, and with

a view to deceive and defraud his just creditors. The answers generally denied the frauds. But Muse Tollison, who is the principal defendant, and upon whom the imputation of fraud chiefly lay, has been positively proved, by several respectable witnesses, not to be entitled to any credit; so we are compelled to come to the conclusion that no reliance can be placed on this defendant's answer in a court of justice. It was objected, however, that it was not proper to receive any evidence to prove the want of credibility of the defendant, Tollison, because the complainant, by putting him to his oath, gave him credit, which he was not at liberty to attack or deny. This objection, by going too far, defeats itself. It would be absurd and mischievous to admit it, and it is not the rule of the court.

Discrediting, then, the answer of Muse Tollison, we are obliged to resort to other testimony and to form our judgment on the weight of the evidence. But it was further objected by some of the counsel that this was a bill of discovery, which gave jurisdiction to the court; and no discovery being obtained, and the answer denying the allegations of the bill, the court was not at liberty to receive evidence to contradict the answers and to decide on that evidence. This is surely not the doctrine of the court. Here a bill is filed charging gross fraud to defeat creditors. All bills in equity may be considered in some degree as bills of discovery, for they all allege facts and interrogate the defendants as to their truth. If the answers of the defendants, admitting or denying the charges alleged, were conclusive, there never would be any necessity for the adduction of evidence. But we know that in practice evidence is constantly produced to contradict the answers, or to establish the facts which are not admitted by the defendants. There is a plain rule on the subject, which is, that the defendant's answer, if he is not proved to be utterly unworthy of credit, shall have so much weight attached to it that it shall be considered as establishing the truth to what it states in answer to the allegations of the bill, unless contradicted by two witnesses, or by one witness and strong circumstances. The very existence and continual application of this rule is decisive against the assumption that because bills in equity demand information from the defendants on their oaths, their answers are therefore to be considered as conclusive and exclusive of all other testimony. I have made these remarks because it appears that there has been a misconception on this subject which ought to be rectified.

In the case we are considering, the answer of the defendant,

Muse Tollison, must therefore be put out of the case, because witnesses of indisputable credit have attested to his entire want of credibility. The answers of the other defendants will have their due weight. The mass of evidence was so great that it would be tedious, and it is unnecessary to state it fully in detail. It is sufficient to state that at the hearing of the cause the complainant, after the production of the evidence, gave up his liens and claims as a creditor on the slaves purchased by McBride, named Dan, Walter and Joe, and indeed to all the property sold as the property to Muse Tollison, except the following: The slaves Ben, Sarah and her child, and Chloe and her child, and to the furniture, and to the house in the village of Spartansburg, and the lands in the country; also, as to a store of goods, said to be sold to Holder. These, then, form the only subjects of litigation requiring a judgment of the court.

Upon a careful examination of the evidence it appears to me that these slaves must be decided to be the property of Muse Tollison, and subject to his debts. Those to whom they were knocked down at the sales were not always participators, or even conscious of the frauds intended; but as they were induced to become purchasers and to convey the property back to Mr. Holder, a man of no property, who does not pretend to claim them, or to the children of Muse Tollison, who furnished the money himself for the payment (as appears by the weight of testimony), I am bound to consider these transactions as fraudulent, and void as to the creditors, more especially as the slaves remained in the possession of said Tollison or at his disposal. This opinion has been formed notwithstanding the attempts to prove that the slaves in question were purchased for the children of Muse Tollison, and paid for by funds and money not the property of said Tollison, but derived from other sources. The great weight of testimony is that the money applied to the payment of these slaves was Muse Tollison's. The presumptions attempted to be set up, of a sufficient fund for the children of Muse Tollison, being applicable to and actually applied to these purchases, are not supported by sufficient evidence to establish that. Thomas Dare testifies that he never paid any money on his bond to the children of Muse Tollison, and there is no evidence of any other fund.

We come now to the consideration of the furniture. Most of these articles were purchased and paid for by Mrs. Tollison in her own name, or by her daughter, Missouri, or by Miss Chandler for her, or by others. The only question is, from

what source the payments were derived? If Mrs. Tollison had separate funds, *bona fide* her own, or was supplied by friends with them, to pay for those articles of furniture, then she may be protected in the enjoyment of them; if not, they must be considered the property of her husband, and liable to his debts. It was contended on her behalf that she was created a sole dealer by deed on the first of May, 1823, and that her purchase of furniture at sheriff's sales were made subsequent thereto, and that she had separate funds from her husband, which she had applied to pay for the articles she had purchased. The right of the husband to appoint his wife a sole trader and dealer was questioned by the counsel for the complainant, and it was also insisted that there was no proof of her having earned any separate estate which she could apply to this purpose.

The statute of 1744 (being the tenth section of the attachment act), see Grimke's Pub. Law, p. 190, is the only provision made by our laws respecting wives being made sole traders. That statute does not create or give a right to husbands to make their wives sole traders, but it recognizes such a right as then existing and in use, and making provision against the abuse; and the usage thus recognized and guarded has continued ever since. It cannot, therefore, be denied that Muse Tollison had a legal right to constitute his wife a sole trader; and his doing so by deed on the first of May, 1823, is not vicious. If not a regular creation of her, it is a sufficient recognition of her, in that character. Her acts are, however, open to examination, and she shall not be made the instrument by which her husband may commit frauds on other persons. He shall not be permitted to pour his private funds into her purse, and protect them from his debts by calling them her separate estate. She must show, when called upon, how she has acquired a separate estate. In the case we are considering, Mrs. Tollison was not made a sole trader till her husband's affairs were deeply embarrassed, and only a few months before the total breaking up of his affairs. It is not shown that she pursued any separate business or trade, by which she could acquire a separate estate. It is, therefore, the highest presumption that she had no separate funds of her own as her separate estate. But it is said there was a separate fund due to Missouri Tollison, the daughter, applicable to this purpose, which was so applied. This consisted of a bond of Thomas Dare and John Tollison, to their granddaughter, Missouri Tollison, for five hundred dollars, when she should attain the age of twelve years. But Dare swears that he has never

paid any money on the bond, and Mr. Benson swears that John Tollison told him he had signed the bond to draw in old Dare to sign it, but that he was not to pay it, and that he had a counter-bond from Muse Tollison. It was also urged that John Holder and Miss Chandler had made some of the purchases, and paid for them, for Mrs. Tollison, and also John Kirby, but John Kirby swears that Mrs. Tollison paid him the money, and it was distinctly proved that neither Holder nor Miss Chandler were in funds of their own, or capable of paying for these articles. The result is that we are reluctantly compelled to come to the conclusion that all the funds which were applied to make these purchases were Muse Tollison's, consequently the articles purchased were his, and liable to his debts. I came reluctantly and painfully to this conclusion, as I should be glad that this unfortunate family had some plank on which to swim; and it would be an act of kindness in the creditors to allow the innocent members of the family some of the articles which were indispensable to their comfort and subsistence.

We come now to the consideration of the land and houses conveyed by Muse Tollison to Berryman Holder and his heirs, by deed, bearing date the first of March, 1822, in consideration, as stated on the face of the deed, of twenty thousand dollars. The deed, upon its face, purports to be an absolute conveyance in fee; but Holder admits that it was intended merely as a mortgage, to secure him the payment of sundry sums of money, which he alleges to be due him, among which were two security debts, one to Mr. Weyman and the other to McMillan. The land has been sold under a judgment of Weyman against Muse Tollison, and bought for Mr. Weyman. Holder claims the payment of the money arising from the sales, or that the sales should be set aside. It was insisted for the complainant that, as the absolute conveyance by Tollison to Holder was a fraud to cover the property of Tollison from his creditors, that the conveyance should be considered null and void, and the property subjected to the debts of Tollison, leaving Holder to his remedy against him for any just demands that he may really have. It appears to me that this would be going too far. Prior to judgment, Tollison had a right to secure Holder for all that was justly due to him, and the deed ought to be considered a security to that amount; what that is cannot be decided without a reference to the commissioner to examine and report upon all the various claims of Holder against Tollison, either for services

rendered, or as security for Tollison, for sums paid by him, or for which he is liable, taking care to examine and report on the payments and discounts.

Some question was made about the execution of the deed, the regularity or fairness of which was questioned. The circumstances were obscure and raised some doubt, but upon the whole, I am satisfied that the deed was duly executed, and intended to be a security to Holder. Another question arose as to a sale of a store of goods by Muse Tollison to Holder. The evidence appears to establish that this sale was fictitious, and intended as a cover to protect the goods for Tollison. The last question regards the costs. With respect to Muse Tollison, Holder, and those who combined with him to defraud his creditors, undoubtedly costs should be decreed. There are defendants, however, who do not appear to have been blameworthy in these transactions, and the suspicions of the complaint, though colorable, would not justify giving costs against them.

The decree was that the property which appeared to have been purchased with Tollison's funds, should be made liable for his debts; that Holder should be charged with twenty-four thousand dollars on account of the creditors of Tollison having received debts and goods of Tollison to that amount, and that the conveyance to him should stand only as a security for his claims on Tollison, of date previous to complainant's execution.

From this decree the defendants appealed on the various grounds involved in the case.

Irby, J. W. Farrow, A. W. Thompson and Clendenin, for the appellants.

W. Thompson, for the respondent.

GAILLARD, Chancellor. We have considered this case, and are satisfied that the transactions of Tollison and his coadjutors were tainted generally with fraud; and the decree must be supported, as far as it decides against the defendants; but we are of opinion that the decree did not go far enough. It orders that the deed made by Tollison, conveying his lands to Holder, for the nominal consideration, should stand as security for such balance as might be found to be *bona fide* due by Tollison to Holder. The court is of opinion that although there might be something due by Tollison to Holder, the latter is not entitled to the benefit of the conveyance as a security for what may be found due, because the deed making an absolute conveyance of the land by Tollison for a large nominal price was intended as

a fraud to cover his property from his creditors, and as Holder lent his name to this fraud, he ought not to derive any benefit from it. The deed must, therefore, be considered void, and Holder must be left to pursue his remedy against Tollison, if there be anything due to him, which is, at least, doubtful. Should he choose to pursue his remedy, he may be at liberty to go into the proof of the actual value of the store of goods purchased by him from Tollison and of the debts due.

It is, therefore, ordered and adjudged that the decree of the circuit court be affirmed, except so far as the same orders the absolute deed, from Tollison to Holder, of the land, to stand as a security for what might be found due by Tollison to Holder; which is hereby reversed, and the said deed declared fraudulent and void. It is also ordered that if Holder choose to pursue his claim against Tollison, that he shall be at liberty to go into proof of the real value of the store purchased by him from Tollison, and of the amount of debts due to said store and assigned to him.

THOMPSON and JAMES, Chancellors, concurred.

DESAUSSURE, Chancellor. I concur with the decree of the court, except with respect to the deed by which Tollison conveyed his land to Holder absolutely. It appears to me that the decree of the circuit court, ordering the instrument to stand as a security for what might be ascertained to be justly due by Tollison to Holder, was correct. If it had been a mere naked fraud, I should concur in the opinion that the deed ought to be wholly set aside. But Holder really had claims on Tollison, and as he did not claim the land under the absolute deed, but declared openly that he held it merely as a security, and would relinquish and reconvey the land whenever his just demands should be ascertained and satisfied, I think he is entitled to the benefit of this conveyance as a security for his just demand; so far, however, as was consistent with the prior liens of other creditors. It strikes me that this case comes within the distinction made by Chancellor Kent, in the case of *Boyd v. Dunlap*, 1 Johns. Ch. 478, between deeds wholly voluntary and fraudulent and those which are founded on some consideration, though very inadequate. There are, however, I admit, some decisions which go further and perhaps justify the court in setting the deed aside altogether.

ADAMS v. HOLCOMBE.

[1 HARPER'S EQ. 202.]

HEIRS, WHEN LIABLE FOR DEBT OF ANCESTOR.—A suit in equity may be maintained against heirs where there has been no administration, to compel them to pay a debt due from their ancestor out of the assets received by them from him.

BILL in equity. The opinion states the case.

DESAUSSURE, Chancellor. This is a suit brought by complainant to be indemnified for the loss he has sustained on a purchase of a slave named Anthony, from John Evans, now deceased. The complainant states that the slave was conveyed to him by bill of sale dated April 8, 1818, but was recovered from him in an action at law by John Cheatham, who claimed under a bill of sale made by Mrs. Evans, the wife of John Evans, and confirmed by him before the sale to complainant. The complainant brought suit at law against John Evans, on the warranty in the bill of sale; but before he could recover the said Evans died intestate, and no person has administered on this estate, so that no suit at law could be instituted. The defendants, who have married the daughters of John Evans, have possession of his real and personal estate, partly under voluntary deeds, made after the above transaction, and partly since Evans's death, without any authority at all. The defendants admit the voluntary conveyances made to them by John Evans, and their possession of his property; but they endeavored in their answer to make a different case from that stated in the bill respecting the sale of the slave. It was, however, a distinct and independent statement of newly alleged facts, not interrogated to by the bill, such a statement in the answer could not be supported thereby without proof.

The defendants feeling this, and having no proofs to offer in support of such allegations, filed a cross-bill against Francis Adams, charging the facts which they had previously alleged in their answer. The defendant, Francis Adams, denied those allegations, and made his own statement of the case. The case then depends on the proofs, and these are simply the bill of sale, with warranty by John Evans to Francis Adams, on the eighth day of April, 1818, of the slave Anthony, for five hundred dollars; also, the record of a suit at law, by John Cheatham against Francis Adams, for the above Anthony, under an

elder bill of sale (January 21, 1817), of the slave Anthony, signed by Mrs. Evans, and confirmed by John Evans at a subsequent time; and the recovery in that action by verdict and judgment for seven hundred and twenty dollars, besides costs. The complainant in the original bill, Francis Adams, is therefore entitled to recover against the defendants in this court, as, indeed, he would have been at law, if the voluntary deeds by John Evans to his children, and the absence of any administration, had not obliged the complainant to come here for relief. The complainant, however, does not claim the recovery of so much as he was obliged to pay on the verdict and judgment. He furnishes a statement by which, instead of claiming seven hundred and twenty dollars, the amount of the verdict, and ninety-seven dollars, the amount of the costs, he claims five hundred and ten dollars and thirty-one cents, including all costs and fees, and to be indemnified against his note for one hundred and forty-four dollars, passed away to a third person by John Evans, as part of the original purchase-money of the slave Anthony. The voluntary conveyances made subsequent to the transactions, and the possession of the property of John Evans by his children, who refuse to administer, cannot be set up to bar this just claim.

It is therefore ordered and decreed that the defendants do pay to the complainant, Francis Adams, the sum of five hundred and ten dollars out of the estate and effects of the late John Evans which came into their hands by the voluntary deeds above mentioned, or otherwise. And that they do indemnify the said complainant against the sum of one hundred and forty-four dollars on note passed away to a third person, or to repay the sum to said complainant, if he pays the same to the holder of the note. Costs to be paid by defendants.

The appeal was on the ground that the defendants should have been made liable in the first instance in proportion to the value of the property they had respectively derived from the estate of the deceased, John Evans.

By COURT. We are of opinion that the decree of the circuit court is correct. The appellant, however, requests that the decree may be modified; that each of the defendants may be made liable in the first instance for a share of the demand in proportion to the amount received of John Evans, we think this equitable.

It is therefore ordered and adjudged that the decree of the

circuit court be affirmed. But that the resort shall be had in the first instance to each of the defendants according to the amount each received from John Evans; all to be ultimately liable. The commissioner to examine and report the proportions.

DESAUSSURE, GAILLARD, WATIES, THOMPSON, and JAMES, Chancellors, concurred.

AM. DEC. VOL. XIV—66

CASES
IN THE
SUPREME COURT OF ERRORS AND APPEALS
OF
TENNESSEE.

TOWNSEND v. TOWNSEND.

[PECK, 1.]

PAPER MONEY and the colonial tender laws considered, and their history given, for the purpose of determining the evils intended to be remedied by article 1 of section 10 of the constitution of the United States.

EXECUTION, SUSPENSION OF—CONSTITUTIONAL LAW.—A statute directing that upon any judgment thereafter obtained execution shall not issue until two years after the rendition of the judgment, unless the plaintiff shall indorse upon the execution that satisfaction may be received in notes of the State Bank of Tennessee and its branches, and the Nashville Bank and branches, is unconstitutional and void.

OBLIGATION OF CONTRACTS.—If, when a contract is made, the creditor has the right to immediate execution, payable in money, a statute subsequently passed suspending the right to execution for two years, or making the contract payable in something else than money, is void, because it attempts to impair the obligation of a contract.

REMEDIES, POWER TO ALTER.—The legislature may alter remedies; but the alteration must not, so far as prior contracts are concerned, appear on the face of the statute to be enacted to render the remedies less efficient or more dilatory than those in force when the contract was made.

APPLICATION to the supreme court for an order on their clerk, requiring him to issue execution. The clerk of the supreme court, having been requested to issue an execution on a judgment between the parties to this action, without the indorsement required by the act of 1819, chap. 19, refused; whereupon the court was moved to order him to issue the execution, disregarding said act as being unconstitutional. The other facts are stated in the opinion.

HAYWOOD, J. The act of 1819, ch. 19, directs that upon any judgment thereafter to be obtained, execution shall not issue

until two years after the rendition of such judgment, unless the plaintiff shall indorse upon the execution that the sheriff or other officer shall and may receive in satisfaction of said execution notes on the State bank of Tennessee and its branches, and the Nashville bank and its branches, or any of them, and such other notes as pass at par with them, etc.

The same, or a similar provision is made by a law of 1820, for forming a new bank, and for loaning out the moneys that it may issue. These acts of the legislature are urged to be unconstitutional and void. And various clauses of the state constitution, and of the constitution of the United States, are said to be in direct repugnance to these acts; and if so, it is well to admit in the outset that the acts, like every other act whose basis is authority, are void if the authority be not given. We will take up these several clauses one after another, and examine each in its turn to discover whether the acts in question are really unconstitutional, as they are alleged to be.

First, then, let us take into consideration art. 1, sec. 10, of the constitution of the United States: "No state, shall, etc., emit bills of credit, or make anything but gold and silver coin a tender in payment of debts; pass any, etc., *ex post facto* law, or law impairing the obligation of contracts," etc. The two first sentences respect tender laws and paper money; the construction to be put on them should repress and prevent the evils they were intended to obviate; and what these are must be understood by the actual evils which paper money and tender laws produced in the time of the colonial governments; in time of the war of the revolution, and after that war, before the adoption of the constitution of the United States; and also by the effects which these clauses produced after the adoption of the constitution; and then by considering what will be the effect of the act of assembly now under contemplation should the same be deemed valid, we shall be able to discover whether these effects are the ones intended to be prevented by the clauses of the constitution in question.

What, then, is the history of paper money and tender laws under the colonial governments? North Carolina issued paper money in 1713, eight thousand pounds, and the money depreciated. The lords proprietors would not receive it for quit rents, though issued to defray the expenses of the Tuscarora war. It could not be remitted to England, they said, at the same time peltry was received by them. The next North Carolina emission was in 1722, twelve thousand pounds; the next

in 1729, forty thousand pounds; the next in 1734, one thousand pounds; treasury notes in 1756, 1757, 1758, and 1759; one emission in 1760, of twelve thousand pounds; one in 1761, of twenty thousand pounds; one in 1771, of sixty thousand pounds, to defray the expenses of suppressing the regulators. At this time, there was already afloat seventy-five thousand pounds. In 1729, the money depreciated and could never be raised to its original value. In 1730, the depreciation was three and a half for one; in 1735, it was five for one; in 1739, it was seven and a half for one; in 1740, it was received in payment for taxes, at the rate of seven and a half for one, and thus the government redeemed, and got clear of it. The treasury notes depreciated. There is no instance of paper money which did not depreciate, let the plan for sustaining its credit be of whatever description it might. Paper money, in the time of the colonial governments, was issued in most of the provinces, and in some of them depreciated more than it did in North Carolina. The attempt was made in Massachusetts to issue bank bills, loaning them out on interest and on real and personal security, to be redeemed gradually, by the payment from the borrowers of one twelfth, making the bills a tender, and the refusal of them to incur the loss of the debt. These provisions did not delay the depreciation for one instant. The rate of exchange in the first year was one hundred and fifty, and in the second, two hundred per cent. In 1729, Massachusetts, Rhode Island, and Connecticut had issued paper money. It depreciated. There was an immense quantity afloat; but the people still clamored for more. Massachusetts and New Hampshire were restrained from further emissions by royal instructions to the governors. Rhode Island could not be restrained, because she chose her own governor; and she issued one hundred thousand pounds. It instantly depreciated from nineteen to twenty-seven shillings per ounce silver, the former being the settled value before the emission. In 1741, in Massachusetts, the paper money being about to be redeemed by gold and silver, remitted from England to reimburse the colonies for the exertions made in the late war above her quota, an apprehension of the scarcity of money, and consequence distress of individuals, excited a great uneasiness in the colony; a bank was forthwith proposed to supply the place of the paper money thus to be redeemed. Every borrower was to mortgage a real estate in proportion to the sums he should take from the bank, or at his option, give personal security, when the sum should exceed one hundred

pounds, to pay annually three per cent. on the sum borrowed, and four per cent. of the principal. To prevent the general confusion which was anticipated from this institution, the parliament interfered, and suppressed the company. The Massachusetts currency was redeemed at the rate of fifty shillings per ounce of silver, instead of nineteen shillings per ounce, the rate at which it was issued. At this time, the popular leaders were using their best endeavors to make further emissions. In 1722, Pennsylvania issued paper money accompanied with penalties, enacted against those who made any difference in the price of their goods when sold for paper and when sold for gold and silver. Notwithstanding this regulation, one hundred and thirty pounds of the paper was only equal in the course of exchange with Great Britain to one hundred pounds sterling, and in some of the colonies, one hundred pounds sterling was equal in value to eleven hundred pounds currency. Such was the state of the currency before the revolution. During the revolutionary war, emissions were made from time to time. Depreciation began in March, 1777, at one and a quarter for one, and progressed to January, 1782, when it was eight hundred for one; and as if ashamed of their own loss of credit, the notes silently withdrew from circulation.

After the war of the revolution was ended, in 1783, the assembly emitted in North Carolina one hundred thousand pounds, and in 1785 they made another emission to the same amount. The uniform fate of these emissions was depreciation. The emission of 1783, in North Carolina, depreciated from eight to ten shillings, and then twelve shillings per dollar. The new emission of 1785 still further depreciated to fourteen, fifteen and sixteen shillings per dollar, instead of continuing at eight shillings per dollar; but returned and settled at ten on the adoption of the constitution of the United States in 1789, and so it has ever since remained. In the debates in the convention of North Carolina upon the paper money and tender laws, it was stated that paper in Rhode Island had depreciated eight for one, and one hundred per cent. or sixteen shillings per dollar in North Carolina. It was also stated that Pennsylvania had issued paper money, but had not made it a tender; that in South Carolina their bills were a tender, as was also the paper money in Rhode Island, New York, New Jersey and North Carolina. It was further stated, that in South Carolina laws had been passed to pay debts with land, and from calling them pine barrens, it is implied, with such land as the debtor might

choose to offer. And further, it was stated that they had ordered debts to be paid by installments.

One cause of depreciation is that the paper could not be remitted to foreign countries. No matter how small the emission may be, it is not equal to gold and silver. He who exchanges it for gold and silver must give a greater quantity of paper. The expense of searching for and finding the silver, of procuring the exchange and of getting it to the place of exportation, together with the risk of conveyance and the greater danger of having the paper money counterfeited, are all considered and involved in fixing the difference of value, and contribute to the increase of depreciation. If the paper money cannot be redeemed till some years hence, that becomes another cause of depreciation. It may be alleviated by an accrual of interest for the delay, but it will nevertheless depreciate from this cause in conjunction with others. One hundred pounds in gold and silver is better than one hundred pounds bearing interest payable at the end of ten years, although it will then be certainly paid; because a present and pressing demand, which cannot be extinguished but by gold and silver, makes it eligible sometimes to give a greater premium than the interest rather than abide the consequences of non-payment. And it will take the notes and a premium besides to procure the one hundred pounds, which, perhaps, a merchant wants to pay a foreign creditor who has called for payment. Another cause of depreciation is the power in the legislature to repeat the emissions at pleasure. For hence arises the just apprehension that repeated emissions will be resorted to. Experience proves that paper money will be issued whenever the cry can be raised of general and public distress, and can cause an application to be made for relief.

With respect to the disorders produced by paper money and tender laws, both theory and experience present them to view. Who will be so imprudent as to give credit to the citizens of a state that makes paper money a tender, and where he can be told, take for a gold and silver debt depreciated paper, depreciating still more in the moment it is paid? Who would trust the value of his property to the citizens of another state, or of his own state, who can be protected by law against the just demands of creditors, by forcing them to receive depreciated paper? Or to be delayed of payment from year to year until the legislature will no longer interfere? Had he not better go to other markets beyond the limits of the state, to dispose of his surplus produc-

tions? Or had he not better refrain from making any such surplus productions rather than be compelled to receive from the purchasers of them less than one half the value agreed to be paid for them? Had he not better remove to another country, where good faith is preserved, with all his property, and there accumulate the rewards of his industry, rather than be continually deprived of a great part of them here to suit the convenience of the purchaser? Would it not be better for a foreign state, whose citizens are thus injured, to use violence and make reprisals rather than suffer such injustice? If such are the evils which theory would lead us to anticipate, they are not less formidable under the test of experience. Depreciated paper prevented equal contributions from the states to the general expense of the nation. New York, for instance, had emitted bills of credit. In them her quota was payable, and by depreciation, of inferior value to the quota of other states where money was not depreciated, though the quotas of the latter were of much smaller denomination. Impressions had been made on the public morals by depreciated paper. Purchasers on credit had derived great gains from depreciation, extensive purchases had been made and at length the hopes of the purchasers were disappointed, and great numbers of the people were found to owe debts which they were unable to pay; a general discontent ensued with the course of trade, petitions were made for relief, embarrassments daily became more extensive, and two parties were formed. One struggling for the observance of public and private engagements and for the relief of individual distress; they urged recourse to frugality and industry, and that the idle should not be protected by the legislature from the consequence of their indiscretion, and should be restrained from involving themselves in difficulties by the conviction that a rigid compliance with contracts would be enforced. This party was for enlarging the powers of congress to effectuate these ends.

The other party pressed for indulgence to debtors, and for less rigor in the exact execution of contracts, for relaxing the administration of justice; for affording facilities for the payment of debts; for suspending the collection of them, and was opposed to any concession of power to congress which might prove hostile to these views. Wherever this party prevailed, paper money was emitted, the delay of legal proceedings was tolerated, suspensions of collecting took place. Where this party had not yet prevailed, the dread of getting the superiority greatly affected the fortunes of a very considerable portion of the community. This uncer-

tainty aided in promoting pecuniary embarrassments, which, at the time, influenced almost all the legislatures of the Union. Public and private confidence was lost; the public debts due to individuals everywhere depreciated. In private transactions, an astonishing degree of distrust prevailed. The bonds of solvent men could not be negotiated, but at a discount of thirty, forty or fifty per cent. Real property was scarcely vendible. Sales of any article for ready money could not be made but at a ruinous loss. The debtor class of society might prove successful at elections, and, instead of paying by the fruits of industry and economy, might be relieved by legislative interference. National wealth and national labor dwindled. Everywhere it was found that the people could not pay their debts. In some instances threats were used of suspending the administration of justice by private violence: Vol. V. of the Life of Washington, 85, 89.

Amongst the various measures proposed for the removal of this gloomy state of things, a general convention to revise the circumstances of the Union was one, and it succeeded. In Massachusetts, a short time before, the utmost distraction reigned. The mob required an abatement of the compensation promised to the officers of the army, a cessation of taxes and of the administration of justice; they required the circulation of depreciated paper, and a relief from public and private burthens. They threatened lawyers and courts, arrested the course of law, and restrained the judges from doing their duty.

Rhode Island, a paper-moneyed state, would not send deputies to the convention, and North Carolina long hesitated in acceding to the federal constitution. Such were the unpromising circumstances which America had to deplore, and such the alarming disorders which were to be remedied by the convention. One of the most powerful remedies was the tenth clause of the first article, and particularly the two sentences which we are now considering. They operated most efficaciously. The new course of thinking, which had been inspired by the adoption of a constitution that was understood to prohibit all laws for the emission of paper money, and for the making anything a tender but gold and silver, restored the confidence which was so essential to the internal prosperity of nations.

There was a great and visible improvement in the circumstances of the people. Conviction was impressed upon debtors that personal exertion alone could save them from embarrassment. An increased degree of industry and economy was the natural

consequence of such an opinion. These clauses, as they were not only necessary for the regulation of intercourse between state and state, and the citizens of each, to prevent the misunderstandings which were likely to arise from the prohibited causes, are equally so for regulating the intercourse of citizens of the same state with each other, were, therefore, considered as a fundamental law of the Union, and also a part of the constitution of each state. What was it to the state of Vermont, if Georgia should pass an *ex post facto* law or bill of attainder, which could operate only upon those within her own territory? The restriction was imposed upon Georgia not for the sake of the people of Vermont, but for the benefit of Georgia, and for fear of the tyranny which her own legislature, at some future time, might be tempted to exercise. A law impairing the obligation of contracts, as it was equally injurious to citizens of the same state, as to foreigners and citizens of other states, is equally prohibited as to all, and is not restrictive of state legislation only so far as regards citizens of other states. The constitutions of the several states had left the power unlimited in their state legislatures. The framers of the federal constitution believed it to be of indispensable importance not to leave this power any longer in the hands of the state legislatures. Experience had demonstrated the baneful effects of its exercise. The known disposition of man excluded the hope that it would not be used for the same pernicious purposes in future. Under the smart of this experience, such were the feelings of the American people at the time, still suffering under repeated emissions of depreciated paper, that not a dissenting voice was raised against the clause before us. No state required it to be expunged, nor did any state propose an amendment. It was universally received without an exception, and the effects of the clauses themselves were miraculous. Public and private confidence took deep root. The people of America were reinstated in the admiration of the world. The precious metals flowed in upon them. Paper money suddenly stopped in its career of depreciation, and took a stand from which it never departed; industry revived universally, and to us in America was given a notable proof, that whenever a nation is virtuous and honest, it will prosper both in wealth and character, and that whenever a contrary course is pursued, such is the wise decree of Providence, that prosperity of either kind will not long follow in her train.

Do these acts of our legislature revive any of the recited mischiefs? If they are valid, what is there to distinguish our pres-

ent situation from that which preceded the federal constitution? Can our legislature emit paper money, and give credit to it by promising redemption by taxes and public property? Will not such money depreciate? Cannot the legislature, to every real purpose, make it a tender? And will not all the consequences ensue which followed the like causes heretofore: Payment of debts with depreciated paper, the dismissal of self-condemnation for unfaithfulness in contracts, a dereliction of industrious efforts, facility in the assumption of debts, a thirst for more paper, public inquietude under the ravages of speculation, indifference if not dislike to the government, loss of public and private credit, the transportation of our commodities to countries where the money is not degraded, the removal of our capital thither, the cessation of active labor, the decrease of national wealth, poverty, embarrassment, open resistance to the laws; and a general cry, as from a sinking ship, of save us! save us!

Part of the loss by depreciation falls upon every man through whose hands the money passes, and to avoid the loss as much as possible, every holder makes haste to get rid of it, and makes some sacrifice to do so. Those to whom debts are due, become debtors to an equal amount, to the end that what is lost by depreciation for debts due to them may be saved by the depreciation of debts due from them. Many who are not debtors, immediately become such by the purchase of property to as great an amount as possible, that they may gain as much in value as the sum to be paid to them loses in value by depreciation. Debts, instead of being extinguished, are multiplied, and the way is prepared for further emissions. Those who become creditors, knowing the risks they run, will have such advanced prices as will be a probable indemnification against them. A small number of credits amount to immense sums, and the thirst for paper money, increasing with the means taken to allay it, new debtors' clamor for more paper. Wanting means, and laboring under the disadvantages inseparably incident to the paper-money system, no state, however blessed by nature, can attain prosperity. Embarrassments incessantly multiply; and for discharging debts without paying them, the country must be visited with misfortunes which no country can bear.

The injuries inflicted upon sister states will not be endured. The creditors there, when the attempt is made to pay gold and silver debts with depreciated paper, will seek redress; should the constitution and laws of the Union be found inadequate to

afford it, the legislature of their own state will look to its strength and to the dissolution of a compact, which, instead of procuring justice to the citizens, excludes them from it. Should the disappointed creditor be a foreigner, after remonstrance to the head of the Union, and the development of its incompetency, he will appeal to his own government, and force will be resorted to. The whole Union becomes exposed for the injustice of one state, and will be disposed to leave it to suffer for its own misconduct, rather than be responsible themselves for that which they cannot prevent. In either alternative, disunion is the end. On the contrary, if the constitution and laws of the Union make void such act of the legislature, and we deem them valid, the debtor in this state will be bound to pay gold and silver to his creditor who lives out of the state; when, at the same time, his debtor within the state, who owes an equal amount, will pay in depreciated paper, perhaps of not half the value; and thus one debtor residing within the state, will be ruined by the legalized unfaithfulness of another. And in our state courts, the same words in the same clause means one thing, but in the federal court another. When part of the citizens are thus sacrificed to suit the convenience of another part, and when such sacrifices become habitual, by the frequent exercise of a power which never lies dormant, after the acknowledgment of its existence, it will not be long before the persecuted portion will seek exemption from the wrongs it endures. Such are the tendencies which the convention meant to eradicate. Acts generative of such tendencies are adverse to the spirit of this clause, and there is a repugnance between them and the constitution.

We come now to a more minute examination of the acts in question. The creditor is denied execution for two years unless he agrees to take paper. What the debtor cannot tender, the creditor is not bound to receive. Whatever he is not bound to receive, he cannot be punished for refusing. The accessory is prohibited as well as the principal. Here the tender is not directly sanctioned. It is only said to the creditor, if you will not take paper, give up the means of getting anything at all for two years, with the prospect of still longer delay by repeated acts of the legislature. Take this paper which I have no right to impose upon you, or give up a right which I have no authority to take from you. Suspension of execution is a penalty, if, but for the act, the creditor would be entitled to it as a right attached to his antecedent contract; and it is a penalty prohibited by the

tenth section now under consideration. If the legislature has power at this day to enact a suspension of execution for refusing to take paper, that section is abrogated. Two years may be extended to a hundred; and where is the difference between a direct injunction to take paper, and the injunction to wait one hundred years if he will not take it? Grant, for argument's sake, that the right to execution is not an antecedent right attached to the contract, but a newly created one given by the legislature only upon condition; shall it be permitted so to frame the condition as to make it involve relinquishment of a right secured by the constitution? By the latter, the creditor is secured against paper money. Can he be required to relinquish that security in order that he may become entitled to the benefit of this new created right to have execution? By such intentions every constitutional right may in succession be bartered away. Constitutional rights are vested, unexchangeable and unalienable. They belong to posterity as well as to the present generation. We may use and enjoy, but not transfer them; and every such condition is utterly void. If execution can be suspended on any condition, then the legislature has an absolute power to suspend it forever. How easy is it to invent a thousand conditions with which no man in his senses would comply? If the right is newly created, and the condition void, it must vest without the performance of the condition; and the result is that if the right be antecedent, suspension is an unconstitutional penalty; if it be newly created, the condition is unconstitutional, and the right vests absolutely. In either alternative the indorsement need not be made.

This conclusion follows upon a correct interpretation of the clause prohibiting tender laws. It equally follows a just interpretation of the sentence prohibiting laws to impair the obligation of contracts, contained in article 1, section 10, of the constitution of the United States, and in article 11, section 20, of our bill of rights. A grant made by the state, being an executed contract, cannot be revoked by the legislature if pursuant to a law made by themselves; this point is so decided in *Fletcher v. Peck*. With respect to executory contracts, it will be admitted without controversy that the terms and conditions of them cannot be in any respect altered or interfered with by the legislature.

The time, place, person or thing to be done cannot be changed by act of assembly. Covenants sometimes by *ex post facto* circumstances become unreasonably burthensome. He

that covenants to pay rent for premises he never enjoys, by the accidental burning of them, must nevertheless pay the rent. A man agrees to perform a voyage by sea under a penalty by way of stated damages for non-compliance, and he is hindered from an exact compliance by adverse winds; still he must pay the penalty. In these, and all other cases of contract, the legislature cannot interfere to make them more just or reasonable than the parties have made them. For thus no contract could be made that the parties might depend on, for fear of the new modeling interposition of the legislature. Thus far is plain, but still the question remains, is the suspension of execution within the prohibition? Does an act to suspend execution impair the obligation of contracts made before it? What the obligation of a contract is, may be discerned by considering what it is that makes the obligation. The contract alone has not any legal obligation, and why? Because there is no law to enforce it. The contract is made by the parties, and, if sanctioned by law, it promises to enforce performance should the party decline performance himself. The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. If this law direct a specific execution, and a subsequent act declare that there shall not be a specific execution, the obligation of the contract is lessened and impaired. If the law in being at the date of the contract give an equivalent in money, and a subsequent law say the equivalent should not be in money, such act would impair the obligation of the contract. If the law in being at the date of the contract give immediate execution on the rendition of the judgment, a subsequent act declaring that the execution should not issue for two years, would lessen or impair the contract equally as much in principle as if it suspended execution forever; in which latter case the legal obligation of the contract would be wholly extinguished. The legislature may alter remedies, but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by the law in being when the contract was made, if such alteration be the direct and special object of the legislature apparent in an act made for the purpose. Though possibly, if such alteration were the consequence of a general law and merely incidental to it, which law had not the alteration for its object, it might not be subject to the imputation of constitutional repugnance. The legislature

may regulate contracts of all sorts, but the regulation must be before, not after, the time when the contracts are made.

Our constitution, art. 11, sec. 7, ordains, "that all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by course of law, and right and justice administered without sale, denial or delay." This clause relates to every possible injury which a man may sustain, and which affects him in respect to his real or personal property, or in respect to his person or reputation, and includes the right which is vested in him to demand the execution of a contract; which being a personal right to a chattel is, when performance is denied or withheld, an injury to him in his goods or chattels. And with respect to it, right and justice is to be done, without sale, denial or delay. In Magna Charta, this restriction is upon royal power; in our country it is upon legislative, and all other power. We must understand the meaning to be, that, notwithstanding any act of the legislature to the contrary, every man shall have "right and justice" in all cases "without sale, denial or delay."

In 1796, when the constitution was formed, it could not have been apprehended that any other department of government, except that of the legislature, would ever have weight enough to offer any obstruction. Experience from 1777 had fully demonstrated the imbecility of every executive office in the United States. From the executive, no such offer could be anticipated. In 2d Institute, 55, my lord Coke says, the king is the speaker, and in contemplation of law, is constantly present in all his courts, pronouncing the words of Magna Charta: "*Nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum.*" In Tennessee every legislature is in contemplation of law during the whole session, and the judge of every court during the whole term, in the constant repetition of the words "right and justice," must be "administered without sale, denial or delay." In 2d Institute, 56, justice is said to be the end, and right the mean, whereby we may attain the end, and that is the law. What that mean consists in is more specially explained in Sullivan, 523, where it is stated to be original and judicial process. Original process, he says, must issue without price, except that which the law fixes and without denial, though the defendant be a favorite of the king or government, who interferes in his behalf, and must be proceeded on by the judges, after suit instituted upon it, without delay, themselves or by order of the king, or, as we say, act of the legislature. And the judges,

where the causes depend, must issue the proper judicial process, without fee or reward, except that fixed by law. In other words, where judgment is rendered, the judges shall cause execution to issue, notwithstanding any order or act of assembly or other pretended authority whatsoever.

This is the long fixed, well-known meaning and legal construction of the words right and justice without sale, denial or delay. They clearly comprehend the case of executions suspended by act of the legislature in every instance where justice requires that it should immediately issue; as it manifestly does, where the law, operating upon the contract when first made, held out to the creditor the promise of immediate execution after judgment.

There is yet another part of our constitution which some suppose takes from the legislature the power to suspend execution. By our bill of rights, sec. 20: "No retrospective law or law impairing the obligation of contracts shall be made." This clause, taken in its common and unrestrained sense, extends to all prior times, persons and transactions, whether civil or criminal; yet, certainly there are some cases coming within its general scope, to which it does not extend. It does not extend to *ex post facto* laws, for they are prohibited by the bill of rights, sec. 11. It does not extend to a law for extenuation or mitigation of offenses, the remission of penalties or forfeitures. A present law may repeal a former one, or may enforce a contract heretofore made; or may make evidence a paper authenticated according to its directions, which was not evidence before, or may suspend computation under the act of limitations for a certain time past, during which a war existed, or no courts were in being; nor are laws void which give further time for the registration of deeds; nor for the disallowance of land warrants unfairly issued; nor divorce laws; nor laws making allowances to members of assembly, their clerks and door-keepers, after the service is performed. That the term retrospective has a very restrained meaning, is abundantly testified by the conduct of subsequent legislatures, and of the judicial tribunals of the country. In February, 1796, the constitution was made; in March, 1796, the legislature gave further time for the registration of deeds, and made registrations under it as good and valid, to all intents and purposes, as if such deeds had been registered in proper time. Similar laws had been made in 1801, 1803, 1805, and almost at the expiration of every two years. These acts have been frequently held valid by judi-

cial determinations. The acts of 1796, ch. 20; 1797, ch. 14 and 43, sec. 4, ch. 45; 1799, ch. 35, sec. 2, ch. 47; 1801, ch. 19; 1807, ch. 85, are all of them retrospective in the most general sense of that term; but they are of unquestionable validity. And what are the laws of 1801, ch. 24; 1803, ch. 25; 1805, ch. 4, for confirming administrations granted and marriages solemnized under the Franklin government, and for giving old verdicts the force and effect of judgments entered upon them? In short, so many are the past transactions, upon which the public good requires posterior legislation, that no government can preserve order, suppress wrong and promote the public welfare, without the power to do so. It is not withheld from any of the state governments, unless the present clause be an exception. Nor does the genius of free government demand that it should not be exercised, as it does that the legislature should not have power to pass an *ex post facto* law; because, with that engine a dominant faction might spread destruction through the ranks of its political adversaries.

The laws 1873, ch. 7; second 1794, ch. 13; 1803, ch. 1, sec. 5; were all of them retrospective in whole or in part, but were never deemed unconstitutional. All these and many other acts of the legislature, establish the truth of the position, that there are some, and indeed many cases, in which retrospective laws may be made. We have viewed with earnest attention the bill of rights, sec. 20, and have considered the inconveniences which any one interpretation will produce, and have finally settled down in this opinion, that the word retrospective, as in the North Carolina and Maryland constitutions it is followed by explanatory words, so here it is explained by the words which immediately follow: "Or law impairing the obligation of contracts," and that the whole clause and both sentences taken together mean that no retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made, the latter words relating equally to both the preceding substantives; and, therefore, that the term retrospective alone, without the explanatory words, can have no influence in this discussion.

There is yet another clause of our constitution which is said to militate against this act of the legislature. Our bill of rights, sec. 8, declares "That no man shall be deprived of his property, etc., but by the judgment of his peers or the law of the land." Property is a thing in being, which is capable of becoming the subject of dominion or ownership, and which actually has a

master or proprietor, and is actually reduced into possession. Property in possession by this clause is secured to the owner so that it cannot be taken from him by due course of law, in a court regularly constituted, and proceeding by the standing rules of law; not by act of assembly, depriving the owner of it for the benefit of some other individual. The state has the eminent domain or *ultimum dominium* over all the subjects of property in its territory, and may use it on urgent occasions for the public good when, in the opinion of the sovereign power, it is just and necessary so to use it. In the war of the revolution, the government authorized impressments of all things necessary for promoting the great cause in which it was engaged. This power of the legislature, by sec. 21 of our bill of rights, is limited in its exercise, though not taken away: "No man's property shall be taken or appropriated to public use, without the consent of his representatives, or without just compensation being made therefor."

The act of assembly now under consideration, takes away no property either for public or private uses, and is, therefore, not affected either by sec. 8 or sec. 21 of the bill of rights.

The result, then, of the investigation we have made, is this, that suspension of execution as directed by these acts of the legislature now under consideration, is forbidden by the prohibition of tender laws, as a direct consequence of the prohibition; also, by the interdiction to pass laws impairing the obligation of contracts, suspension of execution being an impairing of such obligation; and, furthermore, by the declaration, that justice and right shall be done, without delay, in all cases; the process of execution being one sense of the term right which is not to be delayed.

We are, therefore, bound to say that these acts are repugnant to the constitution and void, so far as relates to the suspension of execution; and that execution ought to issue immediately without any such indorsement as the act requires. The judicial tribunals of the country must refuse sanction to acts which are to be executed through their agency, such as an act of suspension of execution is, which cannot take place without the assent of the court. There are some violations which need not their instrumentality, and of course cannot meet their rejection, and which alone the great body of the people must correct. An occlusion of the courts of justice would be one of them. The courts cannot sit but on the days appointed by the legislature, and in that and other instances, the court having no agency,

would have no responsibility. Wherever their co-operation is unconstitutionally required, it is the most sacred of all their duties to withhold it, and whenever they are found to want firmness to do so, the constitution and public freedom die together.

And here it is convenient to obviate an argument of frequent recurrence. The assembly, it is said, have a right to suspend execution, because they may place the terms of the court at such a distance from each other as to make it impossible for a creditor to entitle himself to execution in less than two, three or more years, at the pleasure of the legislature. The assembly has power thus to fix the terms of the courts, and a suspension of execution would be one of the consequences. The power to fix the terms, however, was not granted with a view to such consequence, but to the more easy and convenient administration of justice, consistently with the spirit of the constitution, displayed in the section which requires that the courts shall be always open for the redress of injuries. To fix the terms at a remote distance from each other for the purpose of producing an effect adverse to the spirit of the constitution, would be to use the power of the legislature for purposes not intended in the grant of it to them. It would be an abuse of power, as much so as the suspension of the courts themselves; and certainly the legitimacy of an end produced cannot be established by deducing it from an abuse of power; an abuse so alarming and so odious in its exercise that it never has been resorted to, and perhaps never will be, by the legislature, unless when the calamity to be evaded shall, in the opinion and by the consent of all mankind, be more disastrous and afflicting than the means adopted for its prevention. The indignant disapprobation of the people is a corrective, so powerful that it need not be aided by any auxiliary power in any co-ordinate branch of the government, but may be safely left, as the people have left it, to its own inherent energies. Whenever the people shall be ready to approve of such a measure, the adoption of it may be safely committed to the uncontrolled discretion of the legislature. The power of the legislature will then fairly flow in the channels which the contested argument opens for them, and not, as at present, through others which the argument does not pretend is open to them. The contested argument is unsound unless an illegitimate end, produced by a misapplication of power, can sanctify the like end produced by a direct infraction of the restriction imposed upon that power.

To be more explicit still; if a suspension of execution may be attained through the medium of the legislative authority to fix the times and places of holding courts, it by no means follows that the same end may be attained through the medium of a prohibited legislation upon contracts already made.

It is proper, however, to remark in conclusion, that the same good faith which protects the creditor against injustice, interposes a powerful veto against the subjection of the debtor to a greater burthen than he has undertaken to bear. If he has specially contracted for payment to be made in bank paper, or if such was the meaning of the contract and the understanding of the parties at the time of its formation, it would be highly unconscionable in the creditor to enforce a payment in gold and silver, taking advantage of that extraordinary state of things, which at this time pervades the western country, rendering a payment in gold and silver not only far more burthensome, but almost impossible and absolutely ruinous. The debtor ought to be heard to say *non in hæc vincula veni*. There is a salutary rule in equity which ought to be applied under such extraordinary circumstances, and it is this: Whatever a man has a right to in conscience, and the law has not fully provided for, equity will: 1 Fonb. 15-20. It is a rule which is the foundation in equity of all the precedents we now follow, and which have been established upon it. The immense and almost incalculable difference that at present exists in this state between specie and paper payments, justifies the application of this rule in its fullest extent, to obviate the injustice of creditors who would enforce specie payments, instead of the paper ones which they agreed to receive. Such creditors by bill in equity and injunction should be held to specific execution and be compelled to receive what they stipulated to take, and not be allowed to ruin the debtor by calling for gold and silver. The precise contract ought to be complied with exactly as it was made, and the most perfect good faith be preserved on both sides. This relief ought to be confined to that species of bank paper which the contract specifies; and when there is no such specification in the contract, should be extended to every species which is generally current in the state, the debtor making a proper allowance in all instances for the difference of value between one species and another that is generally current, and for the depreciation that has intervened since the day appointed for payment in the contract itself. The rule of equity must be applied, that he who will have equity must do it. He who seeks relief against injus-

tice must not do injustice, and wherever an injunction issues, security should be given to pay such sum as the court shall finally decree.

These points, to be sure, are not before us for judgment, and we mean no more than to intimate what at present are our general impressions; and to state in general terms the principles which I now think should be resorted to, leaving for future adjudication in each particular case that may occur, the particular relief which that case may require to effect justice according to its circumstances. This is the opinion which I deem the proper one to be given on this question, and which, if it were entirely concurred in by Judge Emerson as it formerly was, I would now finally give, although Judge Whyte is not yet prepared to give his. But as there is some part of this opinion which Judge Emerson does not concur in, namely, that part which enforces paper-money contracts specifically as made, it must therefore not be considered as final till it can be ascertained by the opinion of Judge Whyte, whether, in this point, I am correct or not. For if I am so, then injunctions ought to issue whenever it shall be attempted to extort gold and silver in satisfaction of a paper-money contract, which, however, cannot be issued with propriety and safety to the applicant, before it is known by that opinion, whether such a course be a proper one or not. Under these considerations, it seems better to wait for his opinion than to expose debtors to great losses, without informing them of the means of redress within their power, if any such there be. Should injunctions issue before we are definitely informed upon this point, it might happen that five hundred bills might be filed, and injunctions be issued upon them, all which would ultimately be found unsustainable, and be dismissed, with costs to be paid by the applicants; after an illegal delay of execution for several months. Mischiefs so serious as these, it is prudent to avoid by conforming to the usual practice of courts, not to give judgment till all the members of the court are ready with their opinions.

WHYTE, J., was absent when the foregoing opinion was delivered, but subsequently said that he considered the question as settled in accordance therewith. When Brown and Peck, JJ., afterwards came to the bench, they concurred.

This case is cited by Thompson, J., in *Ogden v. Saunders*, 12 Wheat. 296, in support of the proposition that a state bankrupt law, operating prospectively upon contracts made after its enactment, does not impair the obliga-

tion of such contracts, within the meaning of the constitution of the United States.

In *Farnsworth v. Vance*, 2 Coldw. 108, the court recognise the authority of *Townsend v. Townsend*, so far only as it is decided upon the ground that the acts therein passed upon were unconstitutional, as being a manifest violation of the clause of the constitution prohibiting tender laws. They deny its authority so far as it rests upon the other grounds, and treat the conclusions of the court on those grounds as mere *obiter dicta*. The clause of the federal constitution prohibiting the states from passing laws impairing the obligation of contracts has been frequently construed by the courts, and their decisions have been conflicting. In *Farnsworth v. Vance*, *supra*, a law providing for a stay of execution was held not to come within the prohibition. In *Jones v. Crittenden*, 6 Am. Dec. 531, a similar law of North Carolina was held to be unconstitutional, as being in conflict with the clause forbidding a state to pass any law impairing the obligation of contracts. A late decision of the supreme court of the United States, *Edwards v. Kearzey*, 96 U. S. 595, settles the question, and decides that "the remedy subsisting in a state when and where a contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is, therefore, void." See *Jones v. Crittenden*, 6 Am. Dec. 531, note; and the note to *Goshen v. Stonington*, 10 Id. 136; *Keith v. Clark*, 97 U. S. 454.

SEVIER v. WILSON.

[PECK, 146.]

VARIATION IN BOUNDARY LINES.—If an established or admitted line of a grant varies from the calls of the grant, the other lines, if not marked, should be run with the same variation as the admitted line.

EJECTMENT. Agreed case. The facts are stated in the opinion.

By Court, PECK, J. It appears by the case agreed that a grant issued to Stockley Donelson for sixty thousand acres of land, the boundaries of which are: Beginning at some sycamores and a beech marked, etc., standing on the bank of Cumberland river, where the Virginia line crosses the same, running thence east, one thousand five hundred poles to a stake on the Virginia line; then south four thousand one hundred poles to a stake; then west to the bank of Cumberland river, and up the various meanders of said river to the beginning; also, another grant to John Sevier for twenty-five thousand and sixty acres, joining a survey of S. Donelson, beginning at a hickory, the north-east corner of said survey, running with the Virginia line east two thousand poles to a stake on the said line, then due south four thousand one hundred poles to a stake, thence to the beginning; also, one other grant for thirty-two thousand

acres, on the waters of Cumberland, adjoining his former survey of twenty-five thousand and sixty acres, beginning at some marked trees on the south-east corner of the last-mentioned survey; then with said survey north one thousand and twenty-five chains to the north-east corner of said survey; thence east one thousand and twenty-five chains to a poplar and oak, then south three hundred and twenty chains to a stake, thence to the beginning.

It is admitted that the state line where it has been run by Walker and others, west of Cumberland river, was run at a variation of six and a half degrees; and that to run east along the Kentucky and Tennessee line, so far as the same has been understood and acted upon, between the citizens of the respective states, has been marked with the same variation. It is furthermore agreed, that if by running out the calls of the thirty-two-thousand-acre tract that the plaintiff is entitled, when he gets from the beginning to the north-east corner of his thirty-two-thousand-acre grant, to run off at right angles with the variation of six and a half degrees, the defendant is included in the plaintiff's bounds; but if it be law that the plaintiff is not entitled to run from the said corner at a variation of six and a half degrees, the defendant is not within the bounds, and if the court should be of opinion that the line from the said corner east should be run with a variation as above, then judgment shall be rendered in favor of the plaintiff; but if to be run without such variation, then judgment to be given for the defendant.

From this case agreed, we have a line given which, at this day, exhibits a variation of six and a half degrees from what the needle pointed when the survey was made, supposing the surveyor to have done his duty; which is a legal inference.

The object of courts should be, to give the land originally surveyed where it can be done. In this grant the line of the state is not called for, though the course in the grant is east, and the state line as fixed due east and west, differs from the magnetic needle six and a half degrees, being a variation the same as that found upon the first line; the fact being admitted by mathematicians that the needle does vary, and that this variation differs in different places; the great difficulty is to apply rules which shall operate uniformly; and as perhaps no mathematical rule can be made to apply in this country where surveys were originally made, governed by the needle and not the true meridian; such legal construction should be given in all cases as, if possible, will give the land first surveyed. Then,

by the first line having ascertained the variation to be six and a half degrees, it follows irresistibly that the same variation should be allowed on the second, to trace where the surveyor had run when the survey on which the grant is founded was made.

This construction is aided by our acts of assembly, which contemplate that surveys shall be made in a square or oblong. If we suppose that at the time of the survey the surveyor conformed to these requisites, then, at the point from which the line in question proceeds, he must have set out at right angles to have produced his square or oblong, and that, at the time, the east, as exhibited by his compass, was what, at this day, is found to vary six and a half degrees from it, and coinciding with the line of the state.

This opinion establishing the line which includes the defendant, judgment must be for the plaintiff.

This case was followed by the court in *Lewis v. Harwell*, Peck, 295. The natural boundaries must, in cases of variance, prevail over the courses and distances in deeds: *Bradford v. Hill*, 1 Am. Dec. 546, note; *Campbell v. McArthur*, 11 Id. 738, and note; *Dale v. Smith*, 12 Id. 64, and note. As to allowance for variation of magnetic needle: See *Bryant v. Beckley*, 12 Am. Dec. 276.

WOODSON v. GORDON.

[PECK, 196.]

INDORSEMENT, SECOND DELIVERY OF.—If W., the payee of a note, indorses it to A., and subsequently purchases the note back, and delivers it with the blank indorsement to P., this is a good indorsement to P., and W. is bound by it.

DRUNKENNESS, short of deprivation of reason, will not avoid a contract, unless it was brought about by one of the contractors, for the purpose of obtaining an advantage of the other.

ACTION on a promissory note. The facts are stated in the opinion.

HAYWOOD, J. Gordon gave his note to Woodson for ninety dollars, who transferred it by a blank indorsement to a third person. He then paid him the debt and took back the note, which he lost at gaming when drunk, and in that situation delivered the note, with the blank indorsement on it, to Pryor, who assigned it to McClure, and Woodson gave notice to Gordon, who, notwithstanding, paid it. The questions are: 1. Whether the indorsement, having been made originally for a

different purpose, could, upon an after occasion, be made to answer as a new indorsement to Pryor? 2. What effect the intoxication of Woodson had? 3. What effect is produced by its being lost by gaming?

1. The indorsement being in blank, and both parties agreeing to use it as an indorsement then made, it is no injustice to the payee who, by writing the same indorsement, would certainly have made it effectual. His using the prior indorsement as one then made, was an act perfectly within his power, and having so used it, he cannot complain. And this is not like the case where the indorsee used the indorsement for a purpose different from that intended without the consent of the payee or indorser.

2. Drunkenness is no excuse, if the party was not drawn in by means of the indorsee, for the purpose of taking an advantage of him. At all events, drunkenness, short of a deprivation of reason or insanity, will not do, for then every one will counterfeited intoxication to get clear of his contracts, and which will lead to the investigation in every case, first whether the party was really intoxicated, and what was the degree of intoxication, and whether it should prevail to exonerate the person from his engagement, producing the greatest uncertainty, difficulty and variety of decision upon cases similarly circumstanced, and subjecting everything to the control and the fluctuating opinions of juries.

3. Delivery over of the note is not absolutely void, but so, at the election of the loser by gaming, who may or may not take advantage of the act, and who must show his election by action against the receiver within the time prescribed by the act, which limitation if not observed will make the delivery or payment good forever. Here he might have brought detinue, or some appropriate action, for the recovery of the note, but failed to do so. Nor could Gordon tell whether he ever would avail himself of the act or not. The payee should not be allowed by his own misconduct to throw upon the payor or obligor the difficulty of contending either with him or the indorsee, when he was honestly ready to perform his contract as made, or in any other way than by the reclamation of the note in due time by the means which the law has marked out.

Judgment for Gordon.

On the question of the avoidance of a contract on the ground of intoxication, see the note to *Wade v. Colvert*, 12 Am. Dec. 652; also, *Wigglesworth v. Steers*, 3 Id. 602. On the subject of gaming contracts, see note to *Downs v. Quarles*, 12 Id. 337; *Chiles v. Coleman*, Id. 396.

BELL v. PERKINS.

[PAGE, 261.]

NOTARY'S RECORD AS EVIDENCE.—A marginal entry in the book of a deceased notary, opposite the protest of the dishonor of a bill stating "indorser duly notified in writing," is admissible as evidence.

DECISIONS OF SUPREME COURT OF THE UNITED STATES, upon general questions, ought to be followed by the state courts.

RETROSPECTIVE LAWS.—The provision of the constitution of Tennessee, forbidding retrospective laws considered and held to prohibit laws impairing existing rights, but not to extend to laws preserving rights from destruction.

WRIT of error in an action against the indorser of a negotiable promissory note. The facts are stated in the opinion.

HAYWOOD, J. The declaration states a bill single, drawn by Balch, payable to Whitesides, who indorsed to Bell, and he, by his attorney, Whitesides to Perkins, to be paid ninety days after the twenty-ninth of May, 1819, or in other words, on the thirtieth of August, allowing for the three days of grace. On the thirtieth of August it was presented to Balch for payment, who failed to pay. Non-assumpsit was pleaded by Bell, and there was a verdict and judgment for the plaintiff, and an appeal to this court in the nature of a writ of error. The bill of exceptions states that the plaintiff offered to read a protest, to prove a demand and notice to the indorser, Bell, and Jacob Perkins, to prove that the notary was dead and was in the habit of serving notices on indorsers; all which was objected to, but the testimony was admitted. The proof was, that Bell lived six or eight miles from Charlotte, and that Perkins, the notary, who is now dead, always directed notices of protest against the defendant, to him near Charlotte, Dickson county, Tennessee. This note was protested on Monday, the thirtieth of August. The mail left Nashville for Charlotte on Tuesday in every week, and a letter, put into the mail on Wednesday, would reach Charlotte nearly a week later than if put in on Tuesday. Jacob Perkins said it was the habit of his father to make out the protest the same evening the note was dishonored, and to send notice the first mail after the day of protest, when the indorser lived out of town, directed to the nearest post-office to which the indorser lived. The defendant in error, Perkins, read from the book kept by the notary, Perkins, in his life-time, a marginal note made opposite to the counterpart or copy of this very pro-

test and written in these words, "indorser duly notified in writing, September 1, 1821."

On a former occasion, not being apprised of the late decision of the supreme court of the United States, and examining the question, British authorities, 1 Salk. 285; 15 C. 32; 3 Campbell, 305, 377, they seemed to result in this conclusion, that an entry made by one who has peculiar means of knowing the fact, and who, if living, could be a witness to prove it, shall be received as secondary evidence after his death, if fortified with the presumption in favor of its veracity by the circumstance that such entry either charged the maker of it, or discharged some person who, but for the entry, would be liable to him. And as the entry made in that case upon the books of the dead notary neither charged himself nor were prejudicial to him, that it was, therefore, without the mark which gives to it the capacity of being considered as evidence. But since that time we have been furnished with a decision lately made in the supreme court of the United States, in the case of *Nichols and Webb*, which, in my apprehension, makes it a duty to conform our judicial opinions to it in all the instances that are clearly within its scope; otherwise, upon a subject in which all the states are interested, one rule might prevail in one state, another in the second, and in the third another, and instead of equal benefits extended to all the citizens of the union, some of them must necessarily suffer by remedies of a more confined operation than others, to the influence of which they might be subjected in other parts of it. The natural tendencies of which differences must be disgust and alienation from the government, besides the injustice and wrong to individuals. The rules, therefore, adopted by the supreme court should be followed by all, when made upon a general subject which affects the whole.

The facts upon which the supreme court decided were: "That Perkins, the notary, who is now dead, and who was the father of the witness, Sophia Perkins, kept a regular record of his notarial acts, and uniformly entered in a book kept by himself, or caused the deponent to do it, exact copies of the notes, bills, etc., and in the margin, opposite to the copy of the protest, made memoranda after notification to the indorsers, if any, of the fact of such notification and the manner. And that his notarial record had been, ever since his death, in the house where she lived." And to her deposition she annexed and verified as true a copy of the protest in the case. The copy of the protest states the demand and the day, and a memorandum in

this margin, "duly notified in writing, nineteenth July, 1819, the last day of grace being Sunday, the eighteenth. W. Perkins." The same objection lay to the generality of the marginal note as here, for not specifying the facts upon which the entry of due notification was made, so that the court might judge whether he was warranted in the assertion that the indorser was duly notified. It did not prevail there, because possibly that was the best evidence then extant, and ought to be submitted to the jury, who possibly might infer the necessary fact which it tended to prove, rather than by excluding the testimony to destroy the fact inevitably though it might really exist. And now we ought to consider the same entry capable of proving the same facts which it was then deemed competent to prove, if the jury thought proper to believe the fact which it tended to establish, namely, that he either gave notice personally, or by the mail, which went on the next succeeding day after the demand made, to the post-office nearest the place of residence of the indorser. By the decision in *Webb and Nichols*, the first of September may be taken to be the day on which the notice was given, as there the first of July was taken to be the day of notice, or it might be by a written communication lodged in the post-office on that day, to be sent by the next mail, which would have been too late; or it might be by personal notice served on that day, which would have been good, or by mail on the thirty-first, though the entry was not made till the first of September. It was competent to be given to the jury, because, if taken by them in either of two ways, it proved a good notice, and they were the judges to determine whether it proved that more than the other.

Certainly we have further matter to determine, which the supreme court had not, whether there ought to be a new trial for the insufficiency of the evidence to support the verdict. The rule we are governed by on the subject is not to grant a new trial unless the facts proved be grossly inadequate to that end, and here we cannot say so, taking into view the testimony of Jacob Perkins, who says it was the habit of his father to make out the protest the same evening the note was dishonored, and to send notice by the first mail after the protest. We can not discover that the jury were unfounded in believing in testimony that the notice was sent in the mail on the thirty-first, though the entry of its transmission was not made till the first of September, or that it was given personally on the first of September. This testimony of the son is not to be rejected as

incompetent, because it is of the same species and receivable upon the same principles as was the evidence of the notary in the case of *Miller and Hackley*, 5 Johns. 375, and as was the evidence in the case cited from Campbell, 3 Campbell, 305, 379. In both cases the fact is not proved directly, but inferred from circumstances which induced a presumption of the fact. It is, therefore, impossible to say that the evidence is palpably insufficient for the support of the verdict.

Is the entry of "duly notified," which was before the supreme court, different, in point of respectability and credit, from the entry in the same words which is before us? There it was read from the books of the notary, in which he recorded his notarial acts, or caused them to be recorded by his daughter, which books had been in the house where she lived ever since his death. Here was read from the book kept by Washington Perkins in his life-time, a marginal note, made opposite to the copy of this very protest and note, "duly notified in writing." The identity of the books is recognized in the latter instance, but in the former was proved by the circumstances deposed to. There is no substantial difference between them. The testimony, it must be admitted, is imperfect and unspecific, and capable only of raising probability, to which the jury may give the weight they think it merits. It is not received as primary and direct evidence, but only as secondary, for want of the primary and better evidence which, by the death of the notary, is now unattainable. And it is received, not because of any innate mark of veracity, such as is relied upon by the British cases before cited, but upon a quite different principle, the prevention of a great public inconvenience, by the loss of facts upon which depend the rights of individuals, which must perish if those facts become extinct. The general modern custom to make demand, and to give notice by notaries, is the origin of this necessity, and produces this dilemma, that either the debts dependent upon this testimony be lost, or this new species of evidence must be admitted to prove as much as it can. The court has chosen the lesser of two evils, and has proceeded on grounds similar to those upon which entries made by a merchant's clerk who is dead are admissible; the only difference being that here is a more urgent and public necessity than in the case of the merchant's clerk. The reason, however, of its reception points out and limits its extent. Being secondary, it is not to be received where the primary may be obtained. The notary, for instance, being still living, who made the entry, or the entry having been made upon

the information of a person still living, or indeed of any person but the notary himself; for in any of these cases secondary testimony is not the best which it is in the power of the party to produce, and therefore he is not allowed to produce it at all. Supposing the evidence not to be admissible by the rules of common law, then it is apprehended by one of the counsel that an attempt will be made to bring this case within the provisions of the act of 1820, ch. 25, and his opinion is, that if it be covered by that law the same is unconstitutional, being a retrospective law. That position the learned counsel endeavored to maintain in a former argument, which was made by him with great ingenuity, and with as much force as it was possible to apply. The position cannot be supported.

It is most perfectly correct, so far as it regards the construction of laws, that a retrospective operation shall not be given to them, unless the manifest meaning of the law be that it should have such operation; but where such meaning is plain, the will of the legislature should be conformed to in fixing the construction. When it is once determined that the law is manifestly retrospective, then, and not before, arises the question whether it be repugnant to the constitution or not. Upon this point it might be sufficient to refer to two adjudicated cases, one in Overton's Reports, the other in the late opinion upon the indorsement laws; for these ought to settle the controversy, unless palpably erroneous, and then they ought to be rejected, as was done in the case of appeals from orders for roads, and from a practice in equity which had been established for several years, at Knoxville, two or three terms ago, and in several instances in modern times; but quitting hold upon these, and briefly considering the point upon principle, the result must be the same. Article 11, section 20, of the constitution says, "that no retrospective law, or law impairing the obligation of contracts, shall be made." Does it mean all retrospective laws in general, or only some of a particular description, and if the latter, of what particular description? Not retrospective laws in general, for then no law could be made for the remuneration of past services, not even the members of assembly, their clerks and doorkeepers, at the end of each session of assembly. Nor could, further time be given for the probate and registration of deeds, of which there never was any doubt from the first assembly after the formation of the constitution to this day. Such probates and registrations have been sanctioned in a thousand instances

by our courts of justice. Nor can it mean laws made for the preservation and establishment of just rights and titles, which have become imperfect and infirm by the non-observance of some legal ceremony, for these laws are not to take away rights, but to confirm and establish them.

Laws for providing easier modes for proving deeds; for rewarding past services; for mending mistakes in grants and deeds; for giving verdicts in evidence instead of judgments; for legalizing marriages made under the Frankland government, administrations under the same government, and judgments and sales under its authority; and acts of limitation suspended during the time a war lasted; in such instances the law is retrospective, but not unconstitutional, because not such retrospective laws as this article of the constitution prohibits. There are some retrospective laws which it does prohibit, *ex post facto* laws for instance, and laws impairing the obligation of contracts; these are justly prohibited because they destroy existing rights, not preserve them from destruction. If there be any other such laws which the constitution prohibits, time and future emergencies will bring them to light; but to say in general, all retrospective laws are void, is to introduce at one breath all the disorders which have been supposed by the acts before mentioned, and by many others which are not at present particularly remembered; and to wrest from the legislature a power which has been hitherto exercised to the great benefit of the community, and for which, in various instances, complete and perfect justice could not be procured without the use of such laws, is what this court, in my judgment, have not the right, and should not have the wish, to do. Whenever a legal right did once exist, and is likely to be lost by some accident, omission or imperfection, an act of the legislature may be interposed to prevent the loss and to give stability to such rights. In such case no one is deprived of his property, but on the contrary, loss of property is obviated, and just and equitable rights, which conscience sanctions, are preserved. This the constitution does not prohibit, constant usage justifies, and conscience requires. Far otherwise would it be, if a contract were violated, or the property of one man taken and given to another.

The conclusion to be drawn from the foregoing premises is this: that the books and protest, and copy of a bill single, marginal notes, and the evidence of Jacob Perkins, were all properly received, and that no such gross misconstructions made by

the jury were perceptible as would justify this court in setting aside the verdict. And the judgment ought to be affirmed.

WHYTE, J., was of a contrary opinion on all the points.

BROWN, J., took time to advise.

AS TO THE ADMISSIBILITY in evidence of the memoranda of a deceased notary, see *Sharpe v. Bingley*, 12 Am. Dec. 643; and *Halliday v. Martinet*, 11 Id. 462. As to the constitutionality of retrospective laws, see note to *Goshen v. Stonington*, 10 Am. Dec. 131; *Kennebec Purchase v. Laboree*, note, 11 Id. 98. See, also, *Coles v. County of Madison*, 12 Id. 161, and note thereto.

CRAIG v. CHILDRESS.

[PROC. 270.]

COMMON CARRIER, WHO IS.—One who undertakes, for a reward, to carry goods from one place to another, is liable as a common carrier.

COMMON CARRIERS ARE LIABLE for all accidents, but those occasioned by the act of God or the public enemy.

WRIT of error in an action against a common carrier. The facts are stated in the opinion.

HAYWOOD, J. The defendant undertook, for hire, to carry the produce of divers persons in boats from Nashville to New Orleans, there to dispose of the same, and to pay the proceeds to the owners. Amongst others for whom he undertook was Craig, the plaintiff, from whom he received into his boat ten thousand pounds of tobacco; in crossing a current below Nashville, which sets in from an island to the right shore, the boat was carried to the shore by the current, and was stove. Much evidence was given on both sides, and the court charged the jury that this being a contract advantageous to both parties, the defendant, Childress, was bound to use ordinary or reasonable diligence, or that degree of care which most prudent men take of their property, and that under the circumstances of this case, the defendant was bound to apply that degree of skill which was necessary for the safe transportation of the tobacco, guarding against all accidents with reasonable care and diligence; and was bound to take care of the tobacco, as well after it was taken from the wreck and landed, as whilst it was on board. There was a verdict and judgment for the plaintiff in the circuit court, and an appeal in the nature of a writ of error to this court.

And first, as to the charge of the court, the defendant cannot

complain, for it was more in his favor than it ought to have been. One who undertakes, for a reward, to convey produce or goods of any sort, from one place upon the river to another, becomes thereby liable as a common carrier. Having to transact the business intrusted to his care at places distant from the residence of the plaintiff, it is always difficult, and frequently impossible, for the plaintiff to obtain the evidence necessary to fix fraud or negligence on the defendant; and to supersede this difficulty, the law throws the burden of proof upon the defendant, to exempt himself from the plaintiff's action, and makes him liable for all accidents but those which are occasioned by the act of God or of a public enemy. He must know and avoid dangerous parts of the navigation, such as currents, rocks, sawyers long fixed, whirlpools, etc., and should possess the knowledge which is necessary to avoid the dangers which they threaten. Certain events may be specially provided against in the contract, and then the carrier will not be liable for them; but he will be liable for all others not specified in the contract, or included in the exceptions which the law makes, as before stated. Here the loss is occasioned from not being well acquainted with this current and with the manner of navigating there, so as to evade the dangers to be apprehended from it. Nor was he provided with a skillful pilot, nor with boatmen sufficiently acquainted with the navigation of the river; nor, after the accident happened, did he take sufficient care to preserve such parts of the cargo as by careful management might have been preserved.

WHYTE, J., concurred.

Judgment affirmed.

PECK, J., was absent; BROWN, J., having been of counsel, did not sit.

WHO ARE COMMON CARRIERS.—*McClures v. Hammond*, 1 Am. Dec. 598, and note; *Williams v. Branson*, 4 Id. 562; *Dwight v. Brewster*, 11 Id. 133.

LIABILITY OF COMMON CARRIERS.—*Hunt v. Morris*, 12 Am. Dec. 489, note; *Colt v. McMechen*, 5 Id. 200; *Schieffelin v. Harvey*, 5 Id. 206; *Williams v. Grant*, 7 Id. 235; *Elliott v. Rossell*, 6 Id. 306.

JOCELYN v. DONNEL.

[PROC. 274.]

WARD, IMPEACHING.—An award, if good upon its face, can be impeached only by showing misconduct in the arbitrators. If, on the face of the award, it appears that improper testimony was received, it may be set aside; or if a mistake of fact appears by the award or is confessed by the arbitrators, the matter may be recommitted to them; but the court cannot, by extrinsic evidence, inquire into the justice of the award.

ARBITRATORS ARE TO DECIDE, according to their own opinion of equity and conscience, and are not bound to observe any precedents or positive rules of law.

APPEAL from a judgment on an award.

The facts are stated in the opinion.

HAYWOOD, J. There being actions at law depending between these parties, they left the matters in dispute to arbitration. An award was made, and judgment entered accordingly. Jocelyn had first moved that it might be set aside, because, as he alleged, the arbitrators had entertained a wrong opinion upon the construction of certain written articles between himself on the one side, and Donnel and Harris on the other; and because, as he alleged, he had admitted before them the correctness of a certain account exhibited by Donnel, and that, by mistake, they had taken and acted on another, which he never meant to admit. This allegation is not otherwise proved than by his own oath, and is disproved by others.

An award good upon the face of it cannot be impeached but upon objections which go to the misbehavior of arbitrators. If the reception of illegal evidence appear upon the award it may be set aside, or if a mistake of fact appear upon the face, or by confession of the referees, it shall be recommitted; but the court cannot inquire by extrinsic testimony into the justice of the award, for that would be to try the matters in dispute *de novo*. If the arbitrators upon their award have meant to go by the rules of law, and have mistaken the same, the award may, perhaps, be set aside for such mistake; though even this is doubtful. But where no such intent appears in the face the most obvious deviations from the rules of law will not vitiate the award. Arbitrators are to decide according to their own opinions of equity and conscience, without being tied down to the observance of precedents either of law or equity, or of any other positive rules: 10 Johns. 149.

Judgment affirmed.

WHYTE, J., concurred.

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FOR WHAT CAUSES AN AWARD MAY BE IMPRACHED.—In *Mitchell v. Curran*, 1 Mo. App. 453, the court say: "There are five grounds, and only five, upon which the courts will set aside an award. These are: 1. The insufficiency of the award. That means that it is not certain, final, or mutual; that it does not embrace all matters submitted to the arbitrators; or that it does embrace matters not submitted to arbitration; 2. A mistake in fact or law apparent on the face of the award; 3. Irregularity of the arbitrators in their proceedings; as a refusal or neglect to examine witnesses, or in not giving notice of the meetings; 4. Corruption or misbehavior of the arbitrators; 5. Fraud or concealment of the evidence by the parties obtaining the award."

1. An award is mutual if the controversy or demand is finally disposed of, so that the same claim cannot again be made the subject of a suit at law: *Morse on Arbitration and Award*, 378; *Borretts v. Patterson*, 1 Am. Dec. 576; *Blackledge v. Simpson*, 2 Id. 614; *Jacob v. Ketcham*, 37 Cal. 195. It is essential to the validity of an award that it be certain and final: *Waite v. Barry*, 12 Wend. 377; *Comer v. Thompson*, 54 Ala. 265. But this certainty is sufficient if it is certain according to a common intent, and consistent with fair presumption: *Purdy v. Delavan*, 1 Caines, 303; *Karthauss v. Ferrer*, 1 Pet. 222; *Coz v. Jagger*, 2 Cow. 638. An award may be set aside if it decides matters not referred to the arbitrators: *Richardson v. Payne*, 55 Ga. 167; *Collins v. Freas*, 77 Pa. St. 493. If it appear on the face of an award that the arbitrators did not pass upon all that was particularly referred to them the award will be bad: *Blackledge v. Simpson*, *supra*; *Porter v. Scott*, 7 Cal. 312. But otherwise if it does not appear upon the face of the award: *Ruckman v. Ransom*, 35 N. J. L. 565; *Hoagland v. Veghte*, 2 Zab. 92.

2. Nearly all the decisions agree that where a mistake of law or of fact is apparent upon the face of the award it will be good ground for setting aside the award: *Nance v. Thompson*, 1 Sneed, 321; *Pleasants v. Ross*, 1 Am. Dec. 449; *Alken v. Bolan*, 2 Id. 660, and note; *Halstead v. Seaman*, 52 How. Pr. 415. These cases all decide that the mistake must be apparent on the face of the award in order to constitute a good ground for impeaching it. There is another line of decisions which modifies the doctrine of the decisions just given in this, that they allow extraneous evidence to be introduced to show a mistake of law or of facts on the part of the arbitrators. In *Gonger v. James*, 2 Swan, 213, it is held that a mistake in a matter of fact apparent on the face of the award, or by evidence of the arbitrators, is a valid objection. In *Nance v. Thompson*, 1 Sneed, 321, the court say, in a mixed question of law and fact, the mistake must appear on the face of the award, or in some writing of the arbitrators referred to in or accompanying the award. *Morse* says: "Less hesitation has been manifested in treating as conclusive the findings of arbitrators upon facts, than their rulings upon principles of law." *Morse on Arbitration and Award*, 316. In *Fain v. Headerick*, 4 Coldw. 338, it is decided that if the arbitrators assume to decide strictly according to law, and mistake it, although the mistake be made out by extraneous evidence that will be sufficient to set it aside. See, to the same effect, *State of Tenn. v. Ward*, 9 Tenn. 100; *Moore v. Suckess*, 23 Gratt. 160; *Nance v. Thompson*, 1 Sneed, 321. On the question of what is the effect of a mistake made by the arbitrators in matter of law or of fact not obvious on the face of the award, the decisions in this country and in England are very conflicting. It is impossible to reconcile them. The tendency of the later and higher authorities, however, both in this country and in England, is decidedly in favor of sustaining the conclusiveness of the award against objections made

on the ground of mistake of law or fact not apparent from the face of the award itself. In the important case of the *Boston Water Power Co. v. Gray*, 6 Metc. 131, Shaw, C. J., speaking on this subject, says: "Their decisions of matter of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive:" p. 165. Again, he says at p. 166, "But when the parties have expressly or by reasonable implication submitted the questions of law as well as the questions of fact arising out of the matters of controversy, the decision on both subjects is final." The principles here laid down have been cited and approved in numerous decisions in this country: *Indiana Cent. R. R. Co. v. Bradley*, 7 Ind. 49; *Brown v. Clay*, 31 Me. 520; *Rundell v. La Fleur*, 6 Allen, 484. In England in a late case, Cockburn, C. J., in discussing the subject, says: "But the modern cases which have been cited certainly go the length of deciding that unless there be something upon the face of an award to show that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the court will not entertain an objection to it:" *Hodgkinson v. Fernie*, 3 C. B., N. S. 189.

3. Story, J., in *Lutz v. Linthicum*, 8 Peters, 178, says: "If an award was made without due notice to the parties, it ought, on the plainest principles of justice, to be set aside:" See, also, *Elmendorff v. Harris*, 23 Wend. 628; *Dickinson v. R. R. Co.*, 7 W. Va. 390.

4. "Courts of Equity will relieve against the partiality or corruption of arbitrators:" *Hyeronimus v. Allison*, 52 Mo. 102; *Newland v. Douglass*, 2 Johns. 61; *Boston W. P. Co. v. Gray*, 6 Metc. 131; *Smith v. Cooley*, 5 Daly, 401.

5. "An award may undoubtedly be impeached and avoided by proof of fraud, provided it be fraud practiced upon or by the referees:" *Strong v. Strong*, 9 Cush. 560; *Brown v. Bellows*, 4 Pick. 179; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 361; *Beam v. Macomber*, 33 Mich. 127; *Dickinson v. R. R. Co.*, 7 W. Va. 390.

In this country, arbitrators are not bound by any strict rules of law as to the admission of evidence, nor is it a matter of any consequence how they reach an agreement: Morse, p. 165; *Beam v. Wendell*, 22 N. H. 582. They should exercise a reasonable judgment and discretion: *Brown v. Bellows*, 4 Pick. 192. They must all act and consult, and hear evidence, even though a majority may decide: Note to *Moore v. Ewing*, 1 Am. Dec. 200.

AWARD, WHEN FINAL.—See *Woodbury v. Northy*, ante, 214, and note.

GREER v. McCRACKIN.

[PICK, 301.]

ALTERATION IN WILL.—If a testator directs one of the witnesses to his will to make certain alterations therein, which are accordingly made, and assented to by the testator, but not witnessed, the alterations will control regarding personal property, but cannot affect real estate. As respects real estate, the will stands as it stood before alteration.

REVOCATION OF WILLS.—An ineffectual attempt to alter a will does not operate as a revocation.

APPEAL from a judgment of the circuit court establishing a certain will. The facts are stated in the opinion.

HARWOOD, J. Upon a caveat against the probate of the supposed will of John McCrackin, deceased, filed by the plaintiffs in the court of pleas and quarter sessions for the county of Washington, on the second Monday of April, 1820, and issue made up of *devisavit vel non*; the jury impaneled to try the same, found a verdict upon which the court gave judgment, which was appealed from. And in the circuit court of the county of Washington, August, 1820, another jury impaneled to try the same issue found a special verdict; that is to say, that the instrument of writing purporting to be the last will and testament of John McCrackin, deceased, as it was originally drawn, was executed in due form in the presence of John Patton and Samuel G. Chester, subscribing witnesses. They also find, after the said paper had been thus executed and attested, that the testator, John McCrackin, on the second of February, 1820, sent for John Patton, one of the subscribing witnesses, and directed him to alter the said instrument in the following particulars, to wit, in the fifth bequest, which now stands in these words: "It is my will that my son, Henry McCrackin, have the house and lot that he now lives on, by paying two hundred dollars, to be paid fifty dollars per year, after my death, to be paid into the hands of my executors;" which bequest, in the original instrument, stood thus: "It is my will that my son, H. McCrackin, have the house and lot he now lives on, by paying four hundred dollars; to be paid fifty dollars per year after my death, to be paid into the hands of my executors." Also, in the tenth bequest in said instrument, which now stands thus: "That it is my will that my negro girl, Spice, shall be set free at the age of thirty-five, if my wife, Margaret, should die before that time; if not, to serve to her mistress's death, and then to be free, by giving sufficient security; and if Spice should have any children, they are to be set free at the age of twenty-one;" in the original stood thus: "It is my will that my negro girl, Spice, be set free at the age of twenty-five, if my wife, Margaret, should die before that time; if not, to serve to her mistress's death, and then to be free by giving sufficient security." They also found, that when the said Patton, by direction of the said John McCrackin, had made the alterations aforesaid, that said McCrackin put his finger on the signature which was to the original instrument, and said he acknowledged it; and said it was now as he wanted it; but did not sign his name to said instrument, nor did the said John Patton attest the said instrument, nor was the other subscribing

witness present. They also find that all the body of the said instrument was in the proper handwriting of the said John Patton. They also find that the signature to the will was in the proper handwriting of the said John McCrackin. They also find that the following indorsement on said instrument was made and attested by said Patton on said will at the time the alterations were made, to wit: "February the 2d, 1820, the alteration concerning the negro girl, Spice, was made after the will was signed, by the consent of John McCrackin, signed John Patton;" which was wholly in the handwriting of said Patton, as a memorandum to refresh his memory. The court upon this verdict established the will as altered, and ordered it to be registered in the county court.

The plaintiff's counsel contend that the will is void *in toto*. The defendant's counsel contend that the will is good *in toto*, or so far as it has not been legally revoked.

1. Supposing the altered clauses to be a revocation of the original clauses, is it a revocation of all other clauses, and of the whole will?

2. Are the altered clauses a valid disposition of the realty according to the old provision, and the new addition together?

3. If not a valid disposition, can the intent to alter amount to a revocation simply?

1. A desire to alter part is evidence of a satisfaction with all other parts; and proves that the deviser had no disposition or design to revoke these latter parts; and there is nothing in the nature of a will which forces a repeal of the whole, when only a part is the object of dissatisfaction. The testator might say by a new will, I confirm all but such a clause, and revoke that; why not effect the same end by cancellation of the obnoxious clause; or by writing upon the will that such clause shall not stand as a part of his will? What inconvenience follows from the abrogation of part, letting the rest stand in force? The alteration of a deed, which, by its own nature, is not revocable, will destroy the deed, because no longer the same contract by which the obligor has agreed to be bound. But a will is always under the power of the testator, to be altered in whole or in part, according to his pleasure. And an alteration, either entire or partial, is what no one can complain of as injurious to himself. It is but the innocent use of a privilege which the law has bestowed upon him to encourage his industry, and to keep his dependents in the observance of their duties. Not perceiving any reason for considering the revocation of part to

be a revocation of the whole, the opinion which I adopt is, that if the appellants should even prevail to set aside the clauses which the testator attempted to alter, that no other parts of the will would be thereby revoked. In 1 Eq. Cas. Ab. 409, part of the old will was sustained, and the rest was superseded or revoked by the new one. In 7 Bac. Ab. 353, and in 356, the original will was established as to the realty, leaving it to be settled afterwards, whether the legacies as altered, should go to the legatees as altered, which examples show that a part may be revoked, and the other not.

As to the second question, are the altered clauses a valid disposition of the realty according to the old provisions and the new additions together? The alterations show a desire in the deviser to affirm the devise of the house and lot as it stood in the will first executed, with a reduction of the charge on the devisee from four hundred to two hundred dollars. But the new disposition is not subscribed by the deviser in the presence of two witnesses, nor do they attest the alteration by a subscription of their names in his presence. The alteration intended has not been completed, the new disposition is not effected, but a nullity; and the clause in the will devising the house remains in the same state as before it was. But it is supposed, though a new disposition has not been effected, that the intent manifested by it to change the former disposition may be considered a revocation, and as leaving the property contained in it undisposed of at all, in which case the heirs at law will take it as the property of an intestate. To answer this supposition it must be inquired what a revocation is.

A revocation is direct and simple, or it is indirect and consequential. The first takes place where there is a revocation, and no disposal of the property contained in the clause revoked, but the same is left to the disposal of the law. It is consequential when, by an effectual subsequent devise, the subject of a former devise is given to a different devisee. The first devise ceases because there is nothing upon which it can operate. In this instance the revocation is not effected till the subject-matter be differently and effectually disposed of. It is not effected by a purpose or design to dispose differently, unless the purpose or design be perfected. It is laid down by the lord chancellor, in 1 Eq. Cas. Ab. 407, that if a man devise lands to A., and afterwards makes a second will and thereby devises the same lands to B., it shall be no revocation of the devise in the first to A., for it is plain that A. was to lose only what B. was to gain, and

if B. gains nothing by the second, A. will lose nothing that was given to him in the first. But if a man execute a second will which appears to have no other intention than to revoke the first, and to die intestate, though this second be not, in all circumstances, duly executed as a will whereby to pass lands, yet it operates as a revocation of the first. In the other instance it is the different disposition, not the purpose to make it, that produces the revocation; nor, indeed, if the purpose were resorted to, would it be sufficient. Could it be said that a design to dispose of the property to a new devisee is a proof that the deviser intended to die intestate? He intended to pretermitt the heir, and a revocation will introduce the heir. Is it possible, then, to say that there was an intent to revoke, without going in direct opposition to the intent? The *quo animo* is a principal sign by which to discover whether there be a revocation or not; for without the *quo animo*, there is no revocation. It cannot be contended for a moment that here the will of the testator was to revoke simply and unconnectedly with the new disposition which he intended to make. Would it not be a very unfair construction to defeat this devisee of all that was intended to be given to him, because in the attempted alteration, there is an evident purpose to make the devise more beneficial than before it was! It is most certain that here is no consequential revocation. And as to any direct and simple revocation, independently of a new or substituted devise, it seems almost impossible that it can be contended for as this case is circumstanced; but a few remarks upon this subject may not be wholly useless. A parol revocation of a written will was not prohibited in England till the act of 29 Ch. II, called the statute of frauds and perjuries: T. T. 409; Litt., sec. 168; Plow. 344; 3 Rep. 36; 4 Id. 67; 8 Id. 82; Dy. 318. In this country it was not prohibited till 1784, Ch. 22, sec. 11.

By the statute of fraud and perjuries, a revocation simply is required to be in writing, subscribed by the deviser in presence of three witnesses; our act of 1784 is silent upon the subject. Is it deducible from the principles of law applied to the provisions of the act of 1784, that a revocation of a devise executed as required by this act, subscription by the deviser in presence of two witnesses, and by their subscription in his presence, should still be revocable by parol, as before the act of 1784, or is the contrary deducible? One consequence of the affirmative would be, that a will executed with all the solemnities which the law requires, might be overturned by the oath of a

single witness deposing to the declaration of a deviser, made to no other person but himself. The principle of law is, that the annihilation of an instrument in general is to be effected by as much solemnity as was necessarily employed in its constitution; otherwise, there is more evidence for the continuance of the thing established than there is for its dissolution. This indicates a rejection of the idea that a revocation by parol is yet practicable. The same is indicated by other signs. If a written will of personalty cannot be revoked by a subsequent nuncupative will, unless proved by two witnesses, can it be revoked by a written will not signed by the testator, and not attested by any witness; by a mere writing made by one witness, by his direction, either upon the face of a former will, or upon any separate and detached paper? This evidence of revocation is less weighty than that by a nuncupative will is required to be, and if in that case no revocation is produced, so neither does it seem to be in the other. If a written will of personalty cannot be revoked by a nuncupative will, unless proved by two witnesses, though the written will be good without the attestation of two witnesses, is it not inconsistent to say that a written will of realty, executed and attested by the signature of the testator, and of two subscribing witnesses, may be revoked by parol directions given, or declaration made, to one witness only? These considerations seem to evince that a direct revocation of a devise of realty cannot be made with less ceremony than is requisite to a will of realty. With regard to that clause of the first will which respected the freedom of the testator's slave named Spice, after arrival to the age of twenty-five years, it concerns personalty only. The question is, whether such alteration by his direction, without signature or attestation, is a good bequest. Setting his hand to it, would have been a good will of personalty, without any attestation of witnesses, as decided, 1 Eq. Cas. Ab. 409, because the statute having not directed any other mode of making a will of personalty, than what existed at the common law, the law still continued by which this would have been a good will of personalty: 3 Ch. Rep. 155, 161. And, if less evidence by the old law than the subscription by the testator would do, such as a mere writing made by him or by his direction, then here is that writing and direction. In 2 H. & M. 467, a memorandum was written by the testator for making alterations in a former will by a new one, comprising the substance of the old will and the memorandum. The new one was prepared and approved of by the testator, but not

signed by him. He died, and the draft was lost, but was proved to agree in substance with the original will and memorandum. The original will and memorandum were established as the will of the testator. So here, an alteration made in the clause in question, by his direction, is as good as the draft, in that case, which had been approved of and lost, and which, if it had not been lost, would have been taken as the will of the testator. Subscription is not indispensable, for, if in his own hand without signature, that will be sufficient: Swinb., part 4, sec. 28; part 7, sec. 13; 8 Ves. jun. 477. But, if written in another hand, it will not be a good will, unless proved by witnesses, and then it will; or if it be proved that the testator, speaking of it, declared it to be his will. Here it is written in another handwriting by one called on to write it, and declared in his presence by the testator to be his will. And this is sufficient proof as to this clause to establish it as a part of the will of the testator: 7 Bac. Ab. 328, sec. 3.

The original will ought to be established as to all the clauses but the tenth, and this, as altered, should be established as the will of the testator.

My opinion is, that the sentence of the circuit court should be reversed, and that the sentence of this court shall be to establish the whole of the original will, but the tenth clause, and that to be established as altered by Patton, by the direction of the testator.

PECK, J., was of the same opinion.

The question of what constitutes a revocation of a will is discussed at length in the note to *Gains v. Gains*, 12 Am. Dec. 375; see, also, *Pringle v. McPherson*, 3 Id. 713; *Lawson v. Morrison*, 1 Id. 288; *Minuse v. Coz*, 9 Id. 313; and *Johnson v. Brailsford*, 10 Id. 601.

FERGUSON v. KENNEDY.

[PECK, 321.]

LIMITATION, EFFECT ON CESTUI QUE TRUST.—When the trustee is barred by the statute of limitations from maintaining ejectment, the *cestui que trust* is barred likewise.

PRESCRIPTION MAY BE FOUNDED ON a void deed and possession taken and continuously held thereunder.

PRESCRIPTION, EFFECT OF.—When one holds land so that he has a perfect defense by pleading the statute of limitations, the title of the former owner is thereby vested in the adverse possessor.

APPEAL from the circuit court in an action of ejectment. The facts are stated in the opinion.

HAYWOOD, J. A grant issued to Glasgow for the lands in question, twenty-second of October, 1782; he, on the thirtieth of May, 1787, by indorsement on the grant, transferred to D. Davis; which, on the thirty-first of May, 1787, was proven before a judge, and was ordered to be registered, but never was so. D. Davis conveyed to James Allison, twenty-eighth of July, 1791, and he to Esther Allison, who married Ferguson, by deed, twenty-fifth of May, 1792. Ferguson and his wife, the said Esther, in January, 1801, conveyed to Charles Allison, who continued twenty years in possession, and by deed of sixteenth of August, 1816, conveyed to the defendant, Kennedy. Glasgow, by deed of thirteenth of October, 1818, conveyed to the plaintiffs, the children of the said Esther; she died seventeen years before September, 1821, or in the year 1804, her husband one year afterwards, or in the year 1805. The plaintiffs were then infants, and the oldest of them had not arrived at the age of twenty-four when this action was commenced.

The circuit court directed the jury that the deed from Ferguson and wife to Charles Allison, is a color of title under the act of limitations; and that if there were no adverse claim in her life-time before the deed to Allison, the act of limitations could not run against her infant heirs, if they sued before arrival at the age of twenty-four. And that the recitals in the plaintiff's deed did not destroy their title.

Upon this statement of facts the question arises whether the judgment of the circuit court rendered in favor of the plaintiffs be correct or otherwise. The transfer of Glasgow to Davis, indorsed on the grant, was never registered, and all subsequent deeds from Davis or under him could not convey the legal estate, and at most only an equitable estate. The estate which descended, if any, to the plaintiffs from their mother was an equitable one, which cannot be recovered in ejectment upon a trial at law. And when they obtained a deed from Glasgow, on the thirteenth of October, 1818, they acquired for the first time a legal title, if indeed his conveyance at that time could pass one to them; in other words, if he himself was not barred at that time of the legal title by the adverse possession of Charles Allison from 1801 to 1816, continued by the defendants to the time of this action which commenced the twenty-second of July, 1819.

In order to ascertain whether Glasgow was barred or not, it is to be inquired what effect was produced by the deed to Charles Allison, and his possession under it? 1. Was this deed

a sufficient color of title to be ripened into a title by possession for seven years, and the act of limitations. The deed purports to convey a legal estate to Charles Allison; he took possession as under a legal title; but the deed being that of a *feme-covert*, with her husband, for want of a privy examination, was a void deed. And this leads to the question whether a void deed may be made by the act of limitations to convey a perfect title. The deed of a second grantee is a void deed, yet possession under it for seven years makes a good title, by the express words of 1797, ch. 43, and by the same reason that of a *feme* with her husband, may also have the same effect.

And then the next question is, against whom is the act to run and the title of the defendant to be completed? The act of limitations must run against him who could sue in ejectment, for it is that legal action, and legal right of possession upon which it is founded that is to be barred; it is not to run against him who for want of a legal title and right of entry could not maintain ejectment. How could the equitable owner sue; he has no right of entry, and the trustee may recover in ejectment against his *cestui que trust*; the right of entry being in him and not in the *cestui que trust*: 2 Term, 684; Burr's Rep. 1416; he has no such right till acquired by deed. Glasgow was the person to be barred, and in order to avoid the bar, an action of ejectment should have been brought within the limited time; and when he is barred the equitable estate of *cestui que trust*, which is dependent upon his legal estate, is destroyed with it.

The trustee, having the legal title, may be barred by the act of limitations, and of course the *cestui que trust* must; for how can he claim from the trustee a legal estate which has passed by force of the act of limitations from the trustee to the defendant in possession? If the legal title in the trustee could not be barred, then lands conveyed to trustees in trust for *cestui que trust* would be exempt from the act of limitations, and no possession of whatever duration could ever acquire a title for the possessor; and as to all such lands the act of limitations would be repealed, although the contemplation of the act is that possession and color of title shall give a complete legal title to the possessor: 1 Burr. 119; 2 Salk. 421. This legal title he must take from some one who previously had it. There cannot be two legal titles at the same time in two different persons. Whenever the act bars, the possessor has only the same title that the person barred had. And supposing him to be barred of an equitable estate, when the act intended that the

estate to be acquired should be a legal estate, that will support an ejectment; hence, in all instances, the estate barred must be a legal estate, and the person barred the legal owner. There is no hardship in this; for if the trustee will not sue, he is answerable to the *cestui que trust*, or the latter may use his name, and the court will not suffer the trustee to dismiss his suit, any more than the obligee of an unnegotiable bond to dismiss a suit brought in his name by the assignee, or a court of equity will vest the legal title in *cestui que trust*. In the present instance, Glasgow would have conveyed to the *cestui que trust* at any time within the seven years, or would have permitted the use of his name, as he has done in the present case, where one count is on his demise, or would have been directed to convey by a court of equity. All these facilities have been neglected, and the court ought not now to take from the possessor the right which he had to be sued in reasonable time for the accommodation of those who have inexcusably failed to make use of the means with which the law has so liberally supplied them. When Glasgow, then, made his deed to the plaintiffs, he had no legal title, having been barred by the deed to the defendants, and the seven years adverse possession of the defendants under it. And no legal title ever did vest in the plaintiffs by force of his deed to them.

The opinion of the court is that the judgment of the circuit court should be reversed.

PECK, J., concurred. WHYTE, J., did not sit.

IS COLOR OF TITLE NECESSARY?—It was decided in *Waterhouse v. Martin*, Peck, 392, that if one takes possession of land conveyed to him under such circumstances as show that he must have known he was taking no sufficient title at the time to pass the fee, and that at the time of his entry he was a trespasser, such deed will not be good to protect him under the statute of limitations. In that case, Haywood, J., who delivered the opinion, says: "All other acts of limitation but our own (act of 1797), whether of England or of our sister states, are built upon the possession alone, and in some instances, bar only the remedy for the recovery of possession. In this state, not only the right of possession is barred, but the right of property also, and the adverse possessor acquires what his adversary loses. In consequence of this rule, there must be a color of title combined with the possession." In *Barton v. Shall*, Peck, 215, the same judge says: "Mankind would never agree to a perpetual bar of the right of property, were it to be conceded to a mere naked possessor who came upon the land without any reasonable pretense, and knowing himself at the time to be a violator of the law." It became the established doctrine in Tennessee that a possession, in order to be a protection under the act of 1797, must be "under a grant, or under valid means conveyances, or a paper title, which are legally or equitably connected

with a grant:" *Powell v. Harman*, 2 Pet. 241; *Wilson v. Kilcannon*, 4 Hayw. 185. This act of 1797 was superseded by the act of 1819, ch. 28, the second section of which enacts that no person shall maintain an action for any lands, except within seven years from the accrual of the right of action. Even under this act it is held in *Wallace v. Hannum*, 1 Hum. 443, that a naked possession without color or pretense of right gives a right of possession only, and not a title in fee.

The doctrine in reference to the necessity of color of title so long maintained in Tennessee does not seem to prevail in the other states. "The actual occupation, however tortious it might be, however destitute of color of title, either in law or in equity, gives a right to the extent of inclosure against all the world, but the state:" *Munshower v. Patton*, 10 S. & R. 334 [13 Am. Dec. 678]; see, to the same effect, *Overfield v. Christie*, 7 S. & R. 173. Angell on Limitations, sec. 381, says: "The belief is that no case can be put in which a private individual knows that another person claims, and is in the actual enjoyment of land which belongs to him, and neglects to prosecute his right at law, where there is nothing to prevent his doing so, that he will not be barred by the statute of limitations:" See *Drayton v. Marshall*, 1 Rice Eq. 373; *Armstrong v. Ristean*, 5 Md. 256; *Devalch v. Newsum*, 3 Ohio, 57; *Day v. Alverson*, 9 Wend. 223; *Jackson v. Diffendorff*, 3 Johns. 269; *Bradstreet v. Huntington*, 5 Pet. 402; *Sicard v. Davis*, 6 Id. 124; *Elmendorff v. Taylor*, 10 Wheat. 168; *Bowman v. Watson*, 1 How. 189; *Clemens v. Runkel*, 34 Mo. 41.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

NEWMAN v. CHAPMAN.

[2 RANDOLPH, 38.]

UNRECORDED INSTRUMENTS are valid against all persons having actual notice thereof; and this notice may be inferred from circumstances.

LIS PENDENS is generally constructive notice to the whole world. At common law it commenced on the day that the writ bore *teste*, while in chancery it did not exist until the subpoena was served.

LIS PENDENS IN SUIT ON UNRECORDED MORTGAGE.—If a mortgage is not recorded a subsequent purchaser, without actual notice, is not bound by the pendency of a foreclosure suit. In such a case the rules of *lis pendens* are inapplicable.

INSTRUMENTS NOT ACKNOWLEDGED OR ATTESTED so as to entitle them to record, are nevertheless valid between the parties.

PARTIES TO FORECLOSURE.—The assignee of a mortgage may foreclose it without making his assignor a party.

CARRYING DECREE INTO EFFECT.—Courts of equity have the authority to carry their own decrees into effect.

ADVERSE POSSESSION.—The possession of a mortgagor, or of his assignee, is not adverse to the mortgagee, except where the assignee has no notice of the mortgage.

ACCOUNT OF RENTS AND PROFITS may be taken by a commissioner, as well as by a jury.

APPEAL from the decree of the court of chancery, wherein Chapman had filed his bill for the recovery of a certain tract of land, and for an accounting of the rents and profits. It appeared that William Armistead inherited the tract in question from his father, who died in 1788; that William mortgaged the same to Morehouse in December, 1794, which mortgage was assigned to Simms; that Simms filed his bill of foreclosure on the twelfth of May, 1797; that the land was sold pursuant to

the decree of the court on the thirteenth of July, 1804, to Simms, and the sale confirmed; and that on the thirteenth of August following, Simms, by attorney, conveyed the premises to the complainant in the presence of two witnesses. William Armistead, Thomas and Richard Newman were in possession of the land, receiving the rents and profits thereof, and refused to surrender to complainant. Thomas Newman purchased from William Armistead sundry parcels of the tract at different periods, buying one hundred and fifty-one acres on the eleventh of September, 1797; one hundred and seventy-five acres on the twenty-sixth of September, 1793, and five hundred and thirteen acres in 1801. This last lot was purchased immediately from James B. Armistead, who had received a conveyance from William. Thomas Newman denied notice of the foreclosure suit at the time of the purchase in September, 1797, and alleged that he had given notice, at the time of the sale by the commissioner in 1804, of his claim to the five hundred and thirteen acres. Richard Newman answered that he purchased from William Armistead one hundred and sixty-three acres in 1793, denied notice of the mortgage, and averred that he had recorded his conveyance in October, 1793. William Armistead did not answer.

The mortgage deed from Armistead to Morehouse was not recorded within the time prescribed by law.

The chancellor decreed that William Armistead and Thomas Newman should severally deliver to the complainant the lands held by them and comprised within the mortgage to Morehouse, except the one hundred and seventy-five acres described in the deed of September, 1793; and should account for the rents and profits from the ninth day of August, 1804. Thomas Newman appealed.

Stanard, for the appellant, contended that the mortgage was void as to the appellant, it not having been recorded; and that the fact of actual notice of the unrecorded mortgage would not validate it; but that if any notice of such an instrument would be binding upon a subsequent purchaser it must be direct and personal, such as had not been proved in this case on the part of the appellant; that a *lis pendens* was not sufficient notice: *Underwood v. Lord Courtown*, 2 Sch. & Lef. 66; *Sorrell v. Williams*, 2 P. Wms. 482; 1 Vern. 318; Sugd. 536.

Wickham, contra.

GREEN, J. The object of the statute requiring mortgages to be recorded, and declaring that if not recorded as the statute prescribes, they shall be void as to creditors and subsequent purchasers, was to prevent, by affording the means of ascertaining the existence of the incumbrance, the frauds which might otherwise be practiced by the mortgagor and mortgagee on creditors and subsequent purchasers by concealing it. If a purchaser has actual notice otherwise of the existence of the mortgage, he is not only not prejudiced by the failure to record, but is himself guilty of a fraud in attempting to avail himself of the letter of the statute, to the prejudice of another who has a just claim against the property. The statute, indeed, vests in the subsequent purchaser in that case the legal title; yet, although the legal title of the mortgagee is divested by the subsequent conveyance, his equitable right to subject the property to the payment of the debt remains, not only because the mortgage is good between the parties, but, even if void as a conveyance between the parties, it would still be evidence of an agreement between them, and a court of equity will give effect to the equity of the mortgagee, by holding the subsequent purchaser to be a trustee. Upon these principles the court of chancery in England has always relieved a prior purchaser whose deed has not been registered against a subsequent purchaser with notice.

I had at one time great doubts whether the principle of those decisions did not apply to the case of *lis pendens*. Lord Hardwicke, in the leading case of *Le Neve v. Le Neve*, 3 Atk. 646, declared that the statutes of registry in England (which, as to the matter under consideration, are the same in effect as our statutes), only vested the legal title in the subsequent purchaser, and left the case "open to all equity;" and, in that case, he relieved against a subsequent purchaser upon constructive, and not actual notice, the notice being to an agent of the purchaser. A *lis pendens* has always been spoken of in the English court of chancery, as a constructive notice to all the world, as all men are bound and presumed to take notice of the proceedings of a court of justice. If these propositions were universally true, it would seem to follow, that a *lite pendente* purchaser was a purchaser with notice, and would take the property subject to the claims of the plaintiff in the suit, as the defendant held it.

In all questions of fact the existence of the matter in question may be proved by direct evidence, or by the proof of other facts, from which it may justly be inferred that the fact in question does exist. A fact thus proved by circumstantial evidence, is

taken to exist for all purposes, as if it were proved by direct evidence. I cannot, therefore, feel the force of the observation frequently thrown out in modern cases, that a notice to affect a subsequent purchaser, after an unregistered deed, must be actual and such as to affect his conscience, and not constructive. A notice proved by circumstances to exist, affects the conscience of the party as much as if proved by direct evidence. In all other cases a purchaser of a legal estate, with notice of a subsisting equity, is bound by constructive as well as by actual notice; and that because his conscience is affected, and he is guilty of a fraud. Without fraud on his part his legal title ought to prevail. I see no reason why a difference should be made between the case of a purchaser, after an unregistered deed, and a purchaser of a legal title subject to any other equity, as to the proof of the notice which ought to be held to bind them. This distinction between an actual and constructive notice, in the case of a purchaser after an unregistered deed, seems to have proceeded from a doubt whether the relief given in the early cases upon that subject, had not been in opposition to the spirit and policy, as well as the letter, of the statutes of registry.

The rule as to the effect of a *lis pendens* is founded upon the necessity of such a rule to give effect to the proceedings of courts of justice. Without it, the administration of justice might in all cases be frustrated by successive alienations of the property which was the object of litigation pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. This necessity is so obvious that there was no occasion to resort to the presumption that the purchaser really had, or by inquiry might have had, notice of the pendency of the suit to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the writ issued, and on the last moment of the day. For at common law the writ was pending from the first moment of the day on which it was issued and bore *teste*; and a purchaser on or after that day held the property subject to the execution upon the judgment in that suit as the defendant would have held it if no alienation had been made.

The court of chancery adopted the rule in analogy to the common law, but relaxed in some degree the severity of the common law. For no *lis pendens* existed until the service of

the subpoena and bill filed; but it existed from the service of the subpoena, although the bill was not filed until long after; so that a purchaser after the service of the subpoena and before the bill was filed, would after the filing of the bill be deemed a *lite pendente* purchaser, and as such be bound by the proceedings in the suit, although the subpoena gave him no information as to the subject of the suit. A subpoena might be served the very day on which it was sued out, and there is an instance in the English books of a purchaser who purchased on the day that the subpoena was served, without actual notice, and who lost his purchase by force of this rule of law. This principle, however necessary, was harsh in its effects upon *bona fide* purchasers, and was confined in its operations to the extent of the policy on which it was founded; that is, to the giving full effect to the judgment or decree which might be rendered in the suit depending at the time of the purchase.

As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or the plaintiff suffered a nonsuit, or if a suit in chancery was dismissed for want of prosecution, or for any other cause not upon the merits, or if at law or in chancery a suit abated; although in all these cases the plaintiff or his proper representative might bring a new suit for the same cause, he must make the one who purchased pending the former suit a party; and in this new suit such purchaser would not be at all affected by the pendency of the former suit at the time of his purchase. In the case of an abatement, however, the original suit might be considered in chancery by revivor, or at law, in real actions, abated by the death of a party, by *journies accounts*, and the purchaser still be bound by the final judgment or decree. If a suit be brought against the heir, upon the obligations of his ancestor binding his heirs, and he alienates the land descended pending the writ, upon a judgment in that suit the lands in the hands of the purchaser would be liable to be extended in satisfaction of the debt. But if that suit were discontinued, abated, or the plaintiff suffered a nonsuit in a new action for the same cause, the purchaser would not be affected by the pendency of the former suit at the time of his purchase; and if he could be reached at law, in equity it could only be upon proof of actual notice and fraud. If a *lis pendens* was notice then, as a notice at or before the purchase, would in other cases, bind the purchaser in any suit in equity, prosecuted at any time thereafter, to assert the right of which he had notice, would bind the purchaser, so ought the *lis pendens* to

bind him in any subsequent suit prosecuted for the same cause; but it does not. Again, a bill of discovery, or to perpetuate the testimony of witnesses, ought, if all persons are bound to take notice of what is going on in a court of justice, to be a notice to all the world as much as a bill of relief.

But these are decided to be no notice to any purpose; a proof that the rule, as to the effect of a *lis pendens*, is one of mere policy, confined in its operation strictly to the purposes for which it was adopted; that is, to give effect to the judgments and decrees of courts of justice, and that it is not properly a notice to any purpose whatsoever. The English judges and elementary writers have carelessly called it a notice because, in one single case, that of a suit prosecuted to decree or judgment, it had the same effect upon the interests of the purchaser as a notice had, though for a different reason. But the courts have not, in any case, given it the real force and effect of a notice.

I think that the statute overrules this principle of law, in the case of a *lite pendente* purchaser, after an unrecorded mortgage. The decisions in the cases of notice are according to the policy and spirit of the statutes; since, in those cases, the purchaser has the very benefit which the law intended to provide for him, and he is chargeable with *mala fides* in attempting to acquire that to which he knows another has a just right. He cannot complain that the mortgagee has done him an injury by his default in failing to record his mortgage as the law requires. But if the purchaser were held to be affected by the pendency of a suit, if he had not actual notice, he would suffer an injury by the default of the mortgagee, unless it were held to be his duty to inquire if any suit were depending, when he had no reason to suspect that there was any defect in the title. I think that to require him to look to any other source of information than that which the statute has provided for him, would be contrary to the spirit and policy and letter of the statute.

It follows that the decree is erroneous, as it respects the one hundred and fifty-one acres conveyed to the appellant in September, 1797; but as to the five hundred and thirteen acres, which the appellant states in his answer that he purchased in 1800, he is not protected by the statute. He admits that he came into the possession *pendente lite*. He does not deny notice of the mortgage, if that fact be material, upon the pleadings in this cause; and he does not show that he was a purchaser, and that a conveyance was made to him. As to this, then, the decree ought to be affirmed, unless the other objections made at the

bar ought to prevail. These are, that the suit was not so instituted as to attach on Morehouse's title under the mortgage, he not being a party, and there being no evidence that his title was in the plaintiff in that suit; that a court of equity has no jurisdiction, as the plaintiff, if he has a right, has a legal remedy; that the deed under which the plaintiff claims, passed no title, as the property was then in the adverse possession of another; and that the rents and profits should be ascertained by a jury, and not by a commissioner.

If the rule be that a purchaser, pending the suit, is bound by the decree in the suit as the defendant is bound, then it is too late now to urge the first of these objections. It might, possibly, have been urged by Armistead whilst the suit was depending. But, failing to do so, he was bound by the decree, whether it were right or wrong. I think, however, that the objection could not have been relied on with effect in the original suit. The power of attorney, by authorizing the attorney to dispose of the mortgage, for and in the name of Morehouse, authorized him to convey the legal title, and that was the effect of the deed to Simms. The power of attorney being attested by only two witnesses, was not, for that cause, defective. The law does not require any particular form as to the attestation of a power of attorney to convey land; as, between the parties, such a power may be proved by any evidence which would be sufficient to prove any other fact in a court of justice. A court of equity always has jurisdiction to carry into effect its own decrees. In this case, a bill for that purpose was necessary, as well because another party, not appearing as a party on the record, had become interested, as on account of the death of Simms the decree had never been executed. If there had been no change of the interest, and Simms had lived, the decree might have been executed, and Simms let into possession by the ordinary proceedings in the court for that purpose. After the decree was so executed, if Simms, or his assignee, had been ousted or disturbed, he or his assignee would have been bound to proceed at law. The court of chancery was not *functus officio*, until the decree was executed by the delivery of possession.

I do not think that Armistead could hold a possession adverse to Morehouse or his assignee, and, consequently, the conveyances of Morehouse and Simms, passed the title they professed to pass, unless the sale to Newman varied the case; but, that sale being made pending the suit, Newman could no more hold an adverse possession, unless he had taken a conveyance without

notice, than Armistead himself could. Armistead was a tenant at will, and so was Newman, standing in his place.

The account of rents and profits might as well be taken by a commissioner, as ascertained by a jury, and the former is the most usual course.

COALTER, J. I am of opinion that the chancellor erred in his decree, in directing the appellant to deliver possession of the tract of one hundred and fifty-one acres, conveyed by William Armistead to him, on the eleventh of September, 1797, by the deed of lease and release in the record of that date.

The bill claims to set up a mortgage executed by the aforesaid William Armistead, of anterior date to the above conveyance; but which was never recorded, purely on the ground, that at the time of the purchase by the appellant there was a suit pending to foreclose the mortgage. If the act of assembly, in regard to mortgages not recorded, and which was in force at the time this bill was filed, is to be construed in connection with the previous clause in relation to other conveyances, so as to transpose the words from the one to the other, in relation to notice, and thus to make the law precisely what it now is, under the act of 1819, let us inquire how the appellee would have stood in a court of law, on a special verdict, finding simply the mortgage and subsequent conveyance, and a suit pending to foreclose the mortgage at the time of the conveyance.

The case for him would rest on an unrecorded mortgage against a subsequent conveyance, and which is expressly declared by the act to be void, as to such subsequent purchaser, not having notice thereof. What sort of notice? Undoubtedly, such as would affect the conscience of the purchaser; otherwise, the act would be no safeguard to the innocent, as it was intended to be. A mere *lis pendens* is not such notice as that. This has been decided, as will be seen in a case mentioned in a note to the case of *Le Neve v. Le Neve*; and also, as I am told, in a late case which I have not examined, reported in 19 Ves. A court of law could not substitute any other kind of notice for that contemplated by the act; but, if the party has ground for coming into equity, that court too, I presume, must follow the law. But if, previous to the act of 1819, the mortgagee of an unrecorded mortgage stood, as against a subsequent purchaser, as he did in England under the registry acts (and I incline to think he did), then his only remedy was in equity, and there he can only prevail on the ground of fraud, or such notice as would affect the conscience of the purchaser, and which was, therefore,

considered a fraud, and it has been decided, as aforesaid, and, I think, correctly, that a mere *lis pendens* did not affect the conscience. Suppose, in this case, the appellant had not denied notice, no charge of notice being in the bill, but had simply answered that he had purchased for value and got his deed, exhibiting it with his answer, and had demurred to the residue of the bill, could the appellee have succeeded? I apprehend not. Or, would not such an answer have been a full response to the bill, no fraud or notice being charged, and sufficient of itself to defeat the claim of the appellee? I am inclined to think it would, and, therefore, had the appellant exhibited a deed from William Armistead to John B. Armistead, and from the latter to him, for the five hundred and thirteen acres mentioned in the argument, although there is no denial of notice as to it, I should, as at present advised, have thought that the appellee could not have recovered the tract without amending his bill, and putting the fact of notice or fraud in issue, so as to give the appellant an opportunity of answering thereto. It is, however, not necessary to decide this point, because the appellant does not show himself to be a subsequent purchaser of that tract, and it is only against such that the mortgage is void.

Whether, as this is an interlocutory decree, he may hereafter be permitted to file those documents, if they exist, is not for me to know or anticipate. On the record now before the court, the decree must be reversed as to the one hundred and fifty-one acres, and affirmed as to the residue.

Judge BROOKE, concurred, and a decree was entered conformable to the foregoing principles.

CABELL, J., absent from indisposition.

LIS PENDENS.—The rule of law which makes the decrees of a court of justice binding upon one who purchases property from a party during the progress of litigation, springs from the necessity of rendering those decrees effective. As is said in the principal case, without such a rule, the administration of justice might in all cases be frustrated by successive alienations of the property which was the subject-matter of the litigation, pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. And the mere pendency of the action is considered sufficient to put a person on his guard not to buy from one whose property is involved in judicial proceedings; because every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides: 1 Story's Eq. Jur., sec. 405. The necessity of enforcing the decrees of courts is regarded in some instances so urgent as to render unessential a resort to the presumption that the purchaser really had, or by inquiry might have had, notice of the pendency of the suit, in order to justify the existence of the rule. An illustration of the

length to which the application of the rule has been carried is found in the above decision, where it was stated to have been binding in cases where "there was a physical impossibility that the purchaser could know with any possible diligence on his part of the existence of the suit."

It is this manifest hardship of the doctrine of *lis pendens* that has called forth statutory enactments in many of the states of the Union, providing that a written notice of an action involving the title to real property must be filed with the recorder of the county wherein the land lies, to make the judgment or decree binding upon a purchaser pending the litigation. And in jurisdictions where such statutes have not been passed, the course of decision has been to confine rather than extend the application of the doctrine.

THE LAW IS SETTLED, however, in this country, in harmony with *Newman v. Chapman*; and, whether upon the theory of knowledge of what transpires in the courts as one line of authorities holds, or upon the idea of public policy, as is maintained by other decisions: *Fox v. Reeder*, 28 Ohio St. 181, the rules of constructive notice to purchasers during the pendency of a suit are often invoked. In the leading case of *Murray v. Ballou*, 1 Johns. Ch. 566, Chancellor Kent learnedly examined the subject, and said: "The established rule is that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser, so as to effect and bind his interest by the decree. * * * The counsel for the defendant have made loud complaints of the injustice of this rule, but the complaint was not properly addressed to me, for if it is a well settled rule, I am bound to apply it, and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardship upon a purchaser without actual notice; but this seems to be one of the cases in which private mischief must yield to general convenience, and most probably the necessity of such a hard application of the rule will not arise in one out of a thousand instances. On the other hand, we may be assured the rule would not have existed, and have been supported for centuries, if it had not been founded in great public utility." In *Murray v. Lylburn*, 2 Johns. Ch. 444, the same doctrine is approved. The court says: "There is no principle better established, nor one founded in more indispensable necessity than that the purchase of the subject-matter in controversy *pendente lite*, does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation." Other decisions maintaining the same positions are: *Jackson v. Andrews*, 7 Wend. 152; *Harrington v. Slade*, 22 Barb. 166; *Hersey v. Turbett*, 27 Pa. St. 418; *Diamond v. Lawrence Co.*, 37 Id. 353; *Fessler's appeal*, 75 Id. 483; *Loomis v. Riley*, 24 Ill. 307; *Jackson v. Warren*, 32 Id. 332; *Green v. White*, 7 Blackf. 242; *Gassom v. Donaldson*, 18 B. Mon. 231; *Inloe's Lessee v. Harvey*, 11 Md. 519; *Blanchard v. Ware*, 37 Iowa, 305; *Farmers' Nat. Bank v. Fletcher*, 44 Id. 252; *Bennet v. Williams*, 5 Ohio, 461; *Hunt v. Haven*, 52 N. H. 162; *Tilton v. Cofield*, 93 U. S. 163; *County of Warren v. Marcy*, 97 Id. 96. And a purchaser at an execution sale will be bound by the same rules, so far as notice is concerned, as a purchaser directly from the defendant, provided the action in which the execution issued is subsequent to that in which the title to the property is tried: *Turner v. Babb*, 60 Mo. 342; *Pindall v. Trevor*, 30 Ark. 249; *Stoddard v. Myers*, 8 Ohio, 203.

BOTH AT LAW AND IN EQUITY a purchaser, during the progress of a judicial proceeding, is presumed to have constructive notice thereof, so as to render subservient to the decree the property transferred to him. In the following actions at law the principle has been applied: *Jackson v. Tuttle*, 9 Cow. 233; *Jones v. Chiles*, 2 Dana, 25; *Wallen v. Huff*, 3 Sneed, 82; *Hickman v. Dale*, 7 Yerg. 149; *Howard v. Kennedy*, 4 Ala. 592; *Smith v. Trabue*, 1

McLean, 87: *Dennet v. Williams*, 5 Ohio, 461; and see Freeman on Judgments, sec. 200. But in *King v. Bell*, 23 Conn. 593, 598, Chief Justice Storrs remarked: "Whatever may be the extent to which this doctrine of *lis pendens* is carried elsewhere or adopted here, it being now for the first time brought before our courts, we are of opinion that it is not necessary for us in this case to examine it, because it is purely an equitable doctrine, adopted, recognized and enforced in courts of equity alone, and cannot be rendered available in proceedings in courts of law." Notwithstanding this decision, in *Norton v. Birge*, 35 Conn. 250, it is said that *Murray v. Ballou* and *Murray v. Lyburn* have been followed in a great number of cases, both at law and in equity.

WHEN THE SUIT MAY BE CONSIDERED AS PENDING so as to warrant the application of the doctrine of *lis pendens*, is a question of much importance, as sales effected prior to the commencement of an action are not prejudiced by it: *Hawes v. Orr*, 10 Bush, 433. For the purpose of determining the validity of a purchase, the suit is not regarded as pending as to those who have no actual notice thereof until the service of original process, whether the same be done personally, or by some statutory mode taking the place of a personal service: *Hunt v. Haven*, 52 N. H. 162; *Goodwin v. McGehee*, 15 Ala. 232; *Lyle v. Bradford*, 7 Mon. 116; *Lythe v. Pope*, 11 B. Mon. 297; *Bacon v. Gardner*, 23 Miss. 60; *Haughwout v. Murphy*, 22 N. J. Eq. 545; *Edwards v. Banksmith*, 35 Ga. 213; *Bailey v. McGinniss*, 57 Mo. 362; *Samuel v. Shelton*, 48 Id. 444; *Shaw v. Padley*, 64 Id. 519. A voluntary appearance is a sufficient commencement of the suit: *Bailey v. McGinniss*, 57 Mo. 362; *Majors v. Cowell*, 51 Cal. 484. The distinction is thus taken in *Goodwin v. McGehee*, *supra*. "In all cases where the object is to deprive a party of rights *bona fide* acquired, by affecting him with constructive notice, the *lis pendens*, begins from the service of the subpoena, and not from the time the bill is lodged in the register's office." And the court cite in support of this view: *Doe v. McGehee*, 8 Ala. 570; *Boynton v. Rawson*, 1 Clark's Ch. 584; 1 Vern. 319; 2 Johns. Ch. 576. The other adjudications referred to, make a similar distinction in favor of *bona fide* purchasers. In *Leitch v. Wells*, 48 N. Y. 585, it appeared that the complaint had not been filed when the summons was served. All the commissioners concurred in holding that the filing of a complaint before service of the summons was necessary to constitute a pending action. The same principle is laid down in *Murray v. Ballou*, where it is asserted that the *lis pendens* begins from the service of the subpoena after the writ filed. A *bona fide* purchaser is not to be affected with notice of an action in which the defendant accepts service as of a date prior to that of the actual service, thereby making the purchase subsequent to the accepted service: *Miller v. Kershaw*, 1 Bailey's Eq. 479. So where two months after the notice of the pendency of an action to foreclose a mortgage the complaint was filed, and an order subsequently made directing that the complaint therein be filed *nunc pro tunc* as of the date of recording the notice, it was determined that such order was not binding on one who purchased during the two months, and prior to the actual filing of the complaint: *Weeks v. Tomes*, 16 Hun. 349. And in *Kellogg v. Fancher*, 23 Wis. 1, it was decided that persons are not chargeable with constructive notice of an action after service of the summons and complaint, but before any papers have been filed; and that the subsequent filing would not render them chargeable from the time of the service.

As has been already mentioned, many of the states have adopted measures regulating the filing of a notice with the county recorder, and from that time the constructive notice of a pending action begins. But these provisions

usually apply to real property only, and therefore, so much of the doctrine of *lis pendens* as pertains to personal property, must be governed by the rules of the common law: *Leitch v. Wells*, 48 N. Y. 602.

THE PROPERTY MUST BE PARTICULARLY DESCRIBED.—To enable the pendency of an action to operate as notice to a purchaser of the property involved, it is an invariable rule that there should be such a specific and definite description of the property by the pleadings or the registered notice that any one reading it can learn what property is intended to be made the subject of litigation: *Badgen v. Daniel*, 77 N. C. 251; *Griffith v. Griffith*, 9 Paige, 317; *Lewis v. Mew*, 1 Strob. Eq. 180; *Stone v. Connelly*, 1 Metc. (Ky.) 652; *Ray v. Roe*, 2 Blackf. 258; *Miller v. Sherry*, 2 Wall. 237; where the principle was applied to a creditor's bill: *Hamlin v. Bevans*, 7 Ohio, 161, a bill for divorce and petition for alimony which were held not to subject property purchased from the defendant while the action was in progress, the petition not describing any particular property out of which alimony should be paid. In *Jaffray v. Brown*, 17 Hun. 575, the notice of *lis pendens* wherein an attachment had been issued described the property attached simply as "all the real estate of the defendant, Brown, or in which she may have an interest in Chenango county," and it was pronounced a mere nullity.

THE GRANTOR MUST BE A PARTY TO THE SUIT: *Fenwick v. Macey*, 2 B. Mon. 470; for those only are charged with notice whose purchases might render ineffective the decrees of court: *French v. The Loyal Company*, 5 Leigh. 627. But this statement is not to be construed as protecting a purchaser from one who bought of a party *pendente lite*, as such a construction would enable two transfers to overthrow the whole system of *lis pendens*, founded on reasons of necessity and of public policy. And to effect a purchase from the holder of the legal title with constructive notice of an equitable claim against it, the holder of the legal title should be a party to the proceeding: *Miller v. Sherry*, 2 Wall. 250. Should he not be brought in until after the purchase, the *lis pendens* would not take effect by relation, so as to charge the purchaser with notice, although the property may have been specifically described in the bill: *Carr v. Callaghan*, 3 Lit. 265. The strictness with which the doctrine of *lis pendens* is regarded, is evidenced in cases involving equitable interests. If one who has some equitable interest in the property, made the subject-matter of the suit, and for that reason ought to be made a party defendant, neither he nor his assignee will be affected with notice, actual or constructive, unless he is impleaded. And notwithstanding an action to determine the legal title to property, the holder of an antecedently acquired equity may perfect his claim by buying in the legal title: *Parks v. Jackson*, 11 Wend. 442; *Gibler v. Trimble*, 14 Ohio, 323; *Irving v. Smith*, 17 Id. 226; *Clarkson v. Morgan*, 6 B. Mon. 441; *Fogarty v. Sparks*, 22 Cal. 142.

DILIGENCE IN CONDUCTING THE SUIT.—To render the decrees of courts binding upon purchasers, strangers to the proceedings, it is essential that there be a close and continuous prosecution of the suit, with all reasonable diligence: *McGregor v. McGregor*, 21 Iowa, 441; *Herrington v. Herrington*, 27 Mo. 560; *Myrick v. Selden*, 36 Barb. 22; *Watson v. Wilson*, 2 Dana, 406; *Clarkson v. Morgan*, 6 B. Mon. 441; *Hawes v. Orr*, 10 Bush, 435.

In *Gossom v. Donaldson*, 18 B. Mon. 237, it is however stated that it is only unreasonable and unusual negligence which will cause the benefit of the *lis pendens* to be lost. And permitting a suit to lie for four years after it was ready for hearing without obtaining a decree, was pronounced such unreason-

able negligence, in *Erham v. Kendrick*, 1 Met. 150. The recent Kentucky decision of *Hawes v. Orr*, 10 Bush, 431, adopts this rule of diligence in the following language: "A party who claims the benefit of a *lis pendens* against a *bona fide* purchaser must show that the suit was prosecuted with some diligence, and that there was no unnecessary and unreasonable delay in prosecuting it to a final termination." The case then before the court presented circumstances of such delay, the suit for partition having been commenced in 1823, continued from year to year until 1842, and the decree not rendered until 1846. There is doubtless no conflict in the decisions where the negligence has been gross; but a dispute may arise where the diligence has not been reasonable. It is nevertheless apprehended that apart from the Kentucky rule, requiring the negligence to be unusual and unreasonable, any lack of reasonable diligence, any laches or delay injurious to others, will deprive the offending party of the benefits of the pendency of his suit as against innocent purchasers for value: *Fox v. Reeder*, 28 Ohio St. 181, containing an elaborate review of the American adjudications: *Herrington v. McCollum*, 73 Ill. 483; *Freeman on Judgments*, sec. 202; *Wade on Notice*, 359.

Not only should diligence be used, but the proceedings must be continuously prosecuted from the commencement to final judgment or decree: Cases above cited. If a suit at law were discontinued or the plaintiff nonsuited, or if, in chancery the suit were dismissed for any cause not on the merits, or if at law or in chancery, any suit abated; although in all such cases a new action could be brought, it could not affect a purchaser during the pendency of the first suit: *Herrington v. McCollum*, 73 Ill. 476; *Watson v. Wilson*, 2 Dana, 408; *Herrington v. Herrington*, 27 Mo. 560. And a failure to revive a suit, on the death of the plaintiff, for the period of one year, will entitle a purchaser for value, without notice, to hold the property: *Hull v. Deatly*, 7 Bush, 691. And according to some of the authorities, a purchaser after final decree, and before a writ of error or bill of review is prosecuted, is a *pendens lite* purchaser: *Debell v. Foxworthy*, 9 B. Mon. 228; *Clarey v. Marshall*, 4 Dana, 95; *Earle v. Crouch*, 3 Met. 450; *Gore v. Stackpole*, 1 Dow, 31; *Ludlow's Heirs v. Kidd*, 3 Ohio, 541. The doctrine of *lis pendens* is not applicable to one who purchases after the dismissal and before the revival of a suit: *Herrington v. McCollum*, 73 Ill. 473; *Ludlow v. Kidd*, 3 Ohio, 541.

PERSONAL PROPERTY AND NEGOTIABLE SECURITIES.—In regard to negotiable paper, it may be considered settled by the decision of the supreme court of the United States in *County of Warren v. Marcy*, 97 U. S. 96, that the rule that all persons are bound to take notice of a suit pending with regard to the title to property, and that they at their peril buy the same from any of the litigating parties, does not apply to negotiable securities purchased before maturity. The reason of this exception is "to protect the commercial community by removing all obstacles to the free circulation of negotiable paper. If, when regular on its face, it is to be subject to the possibility of a suit being pending between the original parties, its negotiability would be seriously affected, and a check would be put to innumerable commercial transactions." And the court held that "these considerations apply equally to securities created during, as to those created before the commencement of, the suit; and as well to controversies respecting their origin, as those respecting their transfer." In conclusion it is said: "Whilst the doctrine of constructive notice arising from *lis pendens*, though often severe in its application, is on the whole a wholesome and necessary one, and founded on principles affecting the authoritative administration of justice, the exception to its application is demanded by other considerations equally important as affecting the

free operations of commerce and that confidence in the instruments by which it is carried on which is so necessary in a business community." These remarks were applied to certain county bonds transferred to the plaintiff during the pendency of a suit brought against the supervisors to declare their proceedings void, and to prevent the issue of the bonds. The plaintiff was a purchaser for value before maturity, without actual notice of the suit. Decisions cited by the court in maintenance of their position are: *Murray v. Bal-lou*, 1 Johns. Ch. 566; *Murray v. Lyburn*, 2 Id. 441; *Kieffer v. Ehler*, 18 Pa. St. 388; *Winston v. Westfeldt*, 22 Ala. 760; *Stone v. Elliott*, 11 Ohio St. 252; *Mims v. West*, 38 Ga. 18; *Durant v. Iowa County*, 1 Woolw. 69; *Leitch v. Wells*, 48 N. Y. 585. Other cases affirming the same rule are: *Day v. Zimmerman*, 69 Pa. St. 72; *Hill v. Croft*, 29 Id. 186.

Whether the doctrine of *lis pendens* should embrace personal property does not seem to be definitely determined by any series of judicial decisions. In the *County of Warren v. Marcy*, *supra*, it is stated that the exception to the general rule extended not only to negotiable securities, but also "to articles of ordinary commerce sold in the usual way." And Chancellor Kent, in *Murray v. Lyburn*, expressed himself as not prepared to say that the rule should be carried so far as to affect sales of "movable personal property, such as horses, cattle, grain, etc." The court, in *McLaurine v. Monroe*, 20 Mo. 462, were unwilling to hazard any opinion on this precise question as it was not raised by the parties, but said that there was certainly a leaning in the courts against the application of the doctrine to personal property. And in *Chase v. Searles*, 54 N. H. 511, the court refused to recognize the rule in the case of a creditor's bill seeking to subject personalty to the satisfaction of a judgment. On the other hand, it is said in *McCutchen v. Miller*, 31 Miss. 65, 83, that "it may be conceded that at this day it (the doctrine of *lis pendens*) applies with equal force to controversies in regard to personal property," as to those touching real estate.

So far as the reasons on which the rule itself is based are concerned, they would seem to apply with full force to personalty as to realty. The publicity of the judicial proceedings is the same in either case, and the danger of defeating the decrees of a court by the transfer of that to which they relate, are much greater in the case of movable property than in that of real estate. So that, for the protection of litigants, it would seem that even a still more rigid rule should be promulgated to prevent the disposing of personalty than of realty *pendente lite*. The arguments urged in support of a contrary view are drawn from the necessity of adopting no measures that would impair the freedom of commercial transactions, and of protecting *bona fide* purchasers of that of which possession is the chief *indicium* of ownership.

EVANS v. KINGSBERRY.

[2 RANDOLPH, 120.]

CONVERSION OF REALTY INTO PERSONALTY.—Where land is directed to be sold, on a certain condition, it is not thereby converted into personal estate; but, if a valid sale is made, the surplus proceeds must be treated as personalty.

A CONVEYANCE BY A HUSBAND passes the entire interest of his wife, entitled to a life estate, if he survives her; but if she survives him, it passes her estate during his life only.

SPECIFIC PERFORMANCE.—If a purchaser can get the substantial inducement to his contract, he may insist upon taking and be made to accept a title to so much as can be given, compensation being made for the deficiency.

APPEAL from the court of chancery. John W. Bradley was the owner in fee of a tract of land, subject to a life estate in his mother, who had intermarried with Evans. Bradley conveyed his land to two trustees, jointly, to secure the payment of a debt due one Clay, with authority to them, or either of them, to sell the same at auction for cash. The trust deeds contained the provision that any surplus should be paid to Bradley, "his heirs, executors or administrators, or his written order." Before any sale under the deeds, Bradley died, leaving surviving him, his wife Nancy M., who afterwards married with Kingsberry, a daughter, Mary Elizabeth, and his mother. The land was advertised for sale by Bradley's administrator, who stated that there would be no difficulty in getting a clear title for the purchaser. The terms were, one half the money down, the balance on credit. At the sale one Moorman bid off the land for eight thousand five hundred dollars, paying the amount of Clay's claim, two thousand seven hundred and nineteen dollars, and no more. Deeds were executed from one of the trustees, and from Evans and wife, and from the widow, who had not, prior thereto, relinquished her dower; but these deeds were all refused by Moorman, who would not complete his purchase; and it appeared that Mrs. Evans's acknowledgment to her deed was imperfect, and that the widow's deed was also irregularly proved and certified. The bill filed by the trustee, the mother and husband, the widow and the daughter, an infant, as complainants against Moorman, prayed a specific execution of the contract. Moorman admitted the purchase, averred that he did not take possession of the land, stated, as his reason for not completing the purchase, that the deeds were not executed until the object he had in purchasing was defeated, and this, although he had repeatedly applied for them, and prayed that he be substituted to the place of the creditor whose debt he had paid, and that the land be resold to reimburse him.

Supplemental bills were filed, the first by Dunnington, the administrator, against Bradley's heirs, alleging that unless the surplus from the sale be considered assets in his hand, there would not be sufficient to pay the debts of the estate. Mary, the daughter, had died, pending the proceedings, and her heirs were made parties. By stipulation a re-sale was ordered, Moorman reimbursed, and an accounting taken; but it was agreed

that this should not prejudice either of the parties in their right to the surplus of the purchase-money. The second supplemental bill was filed by Kingsberry and wife against all the other parties, praying a confirmation of the sale to Moorman, and claiming the surplus as the heirs of the deceased daughter to whom they contended the proceeds passed.

Upon the hearing of these causes the court decreed that by the terms of the trust deed the overplus of the money, after payment of the debt, interest and expenses, ought to be considered as personal estate, and ordered accordingly.

Johnson, for the appellant.

S. Taylor, contra.

By Court, GREEN, J. The deeds of trust of the twenty-eighth of April, and eighth of May, 1813, did not convert the lands thereby conveyed into personal estate, in the contemplation of a court of equity, since they did not provide that the lands should be converted out and out, and at all events into money; on the contrary the sale was to be made only on the request of C. Clay, or J. W. Bradley, and until a sale was actually made, J. W. Bradley, or his heirs at law, might have redeemed the land upon the payment of the debts secured by the deeds. Whensoever a valid sale should be made, and not until then, the surplus proceeds of sale, after paying the debts, would be personal property, belonging to the person then entitled to redeem, and transmissible to the personal representatives of the person so entitled; and this, whether the contract of sale had been perfected before the death of the party entitled to the surplus by conveyance or not. For, in such case, a court of equity would consider that as done which ought to have been done.

Whether the heirs of Mary E. Bradley were entitled to the equity of redemption in the land upon her death, or her personal representative was entitled to the surplus proceeds of the sale made to Moorman, depends upon the question whether, at the time when the cause was first heard, that contract could have been enforced against Moorman, at the instance of that personal representative and the trustees, or against the other parties to the contract, at the instance of Moorman. At that time, as the agreement of the parties requires the case to be considered, Evans and wife had retracted, by their answer, their assent originally given to the contract. If Moorman was, in other respects, bound to execute the contract, he could not be bound to do so unless the parties insisting upon the per-

formance had been able, at the hearing of the cause, to give to or procure for him such a title as he contracted for.

The title of Evans and wife could not be procured unless they were already bound by the deed which they had executed, and which Moorman had refused to accept; or unless their title would have passed by that deed, if the court had compelled Moorman to accept it; or unless the court could have compelled Evans and wife to execute a new conveyance, or to deliver that already executed to him. No title passed by the deed, as it never was delivered. By the refusal of Moorman to accept it, the deed lost its force as a deed; and a subsequent delivery, by order of the court, without the assent of Evans and wife, would have given it no validity: 5 Co. 1196. The court might have compelled Evans to execute the contract by conveying his interest, either at the instance of Moorman, or of the trustee and personal representative of M. E. Bradley. But the contract could not be enforced against Mrs. Evans, but with her assent. A conveyance by Evans would have passed the entire estate of his wife, in the event of his surviving; but if she survived him, only an interest during his life. And in that case she would have been entitled to an estate for her life in a moiety of the land.

When a purchaser cannot get a title to all he contracted for, if he can get the substantial inducement to the contract, he may insist upon taking, or he may be bound to accept the title for so much as the other party can give a good title for, with a reasonable compensation for so much as the party cannot make a title to; or, in case the title is defective in a small matter, perhaps a purchaser might be compelled to accept the title, with an indemnity against the defect of title. But the contingency of Mrs. Evans surviving her husband, and in that event becoming entitled to a moiety of the land for her life, was such a defect as could not be compensated, since there was no rule by which its value could be estimated; nor was it such a defect as the court ought to have compelled the purchaser to accept an indemnity against. The contract could not, therefore, be enforced by any other of the parties against Mrs. Evans, and was consequently null, and the equity of redemption descended, on the death of M. E. Bradley, upon her heirs at law, subject to Mrs. Kingsberry's right of dower. The decree should be, therefore, reversed, and the cause remanded, to be proceeded in accordingly.

All the judges concurred except CABELL, J., who was absent through indisposition.

JONES v. HOOK.

[2 RANDOLPH, 303.]

STATUTE OF LIMITATIONS OF ANOTHER STATE.—In an action brought in Virginia on a judgment recovered in North Carolina, the statute of limitations of the last named state does not control. The law where the remedy is sought prevails.

APPEAL. The opinion states the case.

Leigh, for the appellant.

Johnson, *contra*.

GREEN, J. The appellant brought an action of debt against the appellees on the eleventh day of September, 1811, upon a judgment recovered by the intestate of the appellant against the intestate of the appellees, in the county court of Warren, in North Carolina, in February, 1800, and the declaration makes profert of the record of that judgment. After a variety of pleading the parties agreed a case to this effect: that such a judgment was rendered as is set out in the declaration, which was never satisfied, either by Hook or his administrators; that the original suit was brought in North Carolina, in 1796, when Hook, then an inhabitant of Virginia, was in North Carolina; that Hook, in 1796 or 1797, returned to Virginia, and continued to reside in Virginia until the time of his death, in 1808; that the testator of the appellant remained in North Carolina until her death, and her administrator was never in Virginia until 1810; that, by the law of North Carolina, actions of debt on simple contract must be brought within three years after the cause of action accrued; and they agreed that if the defendants could avail themselves of the act of limitations of Virginia, or of the aforesaid act of North Carolina, to bar the plaintiff's claim, judgment should be given for the defendants; otherwise that judgment should be given for the plaintiff for four hundred dollars, and twelve hundred and sixty dollars. Upon this case the court gave judgment for the defendants, and the plaintiff appealed.

This agreed case admits the validity and obligatory effect of the North Carolina judgment, unless that effect be obviated, either by the law of North Carolina, stated in the agreed case, or by the statute of limitations of Virginia.

The statute of Virginia has no effect upon the case; for, even if it came within any of the provisions of our statute, as it does not, it falls within the exceptions of the statute.

The law of North Carolina, as agreed by the parties, is strictly an act of limitations, for it is a limitation of the remedy, and does not affect the right farther than by refusing a remedy. The cases cited at the bar show that the general rule is, that rights as to personal and transitory things, are to be determined by the laws of the country where the right accrued, but that remedies are to be governed by the laws of the country in which the remedy is sought. If, therefore, the limitation as to the remedy found in the law of North Carolina would have applied to this case, if the remedy had been pursued in that state, yet it does not apply to any remedy pursued in Virginia. It is probable that even in North Carolina the act limiting actions of debt on simple contracts to three years, could not apply to an action on the judgment in question. The counsel for the appellees, in the court below, supposed that, as at the common law, an action on a foreign judgment was an action on a simple contract; that the statute of North Carolina, limiting actions of debt upon simple contracts, properly applied to this case, if any statute of limitations of North Carolina could apply to the case; overlooking the constitution and laws of the United States, which give to judgments of any of the United States the same effect in all the other states, as they have in the state where they were rendered.

The judgment is to be reversed, and entered for the appellants, according to the agreement of the parties.

COALTER, J. I have not considered it necessary in this case, and not having some of the authorities referred to, have therefore made up no opinion on the question, whether, if there is any statute in North Carolina by which this action could be barred there, that statute would operate here; and, indeed, as it is admitted by the case agreed, that neither the intestate of the appellees, nor the appellees themselves, ever were in the state of North Carolina after the rendition of the judgment in question, so as to be amenable to process there, it is not to be presumed that a statute so unjust can exist. Our statute of limitations, I think, does not extend to the case; and if it did, the facts agreed would bring it within the exceptions in that statute.

It is admitted by the case agreed that the judgment in question is a subsisting judgment unsatisfied, and, of course, that the action of the appellants is sustainable thereon, unless the statute of limitations of North Carolina, in relation to simple

contracts, or our statute of limitations is a bar to the action. In regard to the former, it is alleged that the case agreed is imperfect, because it is not stated whether the intestate of the appellees had been served with process in North Carolina, or whether the judgment was against him as an absentee; nor is it stated whether the judgment was in a court of record or not, and if in a court of record, still that the judgment has no greater force in this state than a simple contract.

According to my view of the case, these questions at most would only have been important on the trial, had the defendants wished to impeach the judgment; but this matter is put to rest by the case agreed, which admits the validity of the judgment. Admitting everything that would show that this judgment had no more validity than a simple contract, and the foundation of it subject to be impeached, it does not follow that a judgment of any kind is a contract. The law of North Carolina, the substance of which is stated in the case agreed, relates to contracts, not to judgments. What the law is there in relation to judgments, has not been stated; doubtless because it would show that this suit would have been barred by it in that state. The idea seems to have been that, supposing it to have no more validity here than a simple contract, that either the law of that or of this state, in relation to such contracts, would be a bar. Our law does not apply, as before stated, and the most that could be contended would be that this action, if prosecuted in North Carolina, would be barred there. But no such law is shown; and, therefore, the question whether such law, if it did exist, could avail the party here, does not arise.

The judgment must, therefore, be reversed, and entered for the appellants.

CABELL, J. The case agreed admits the judgment on which the action is brought, and admits moreover that it has never been satisfied. The only question between the parties is, whether the action is barred by the act of limitations of North Carolina or Virginia.

I consider the law as clearly settled that whatever relates to the essence of the contract is to be governed by the law of the place where the contract was formed; but that what relates to the remedy for enforcing the contract, is to be governed by the law of the place where the contract is sought to be enforced. According to this principle, it is the act of limitations of Virginia, and not that of North Carolina, to which we must look

in deciding this case; and if the case comes within our act, it is also manifest that it comes within the exceptions to the act.

The judgment must, therefore, be reversed, and entered for the appellants according to the case agreed.

BROOKE, J., absent.

CHAMBERLAYNE v. TEMPLE.

[2 RANDOLPH, 384.]

VOLUNTARY CONVEYANCES, made when the donor is largely indebted, are void as against creditors, but are valid between the parties.

VOLUNTARY CONVEYANCES—WHO MAY ATTACK.—A voluntary conveyance will not be set aside in favor of a creditor unless he has established his demand at law by obtaining judgment, and, in the case of personal property, has sued out execution; or unless the donor has died, and it is shown, by a settlement of the administration account, that there are not sufficient assets in the hands of the administrator to pay the debts.

CONTRIBUTION AMONG DONEES.—When a decree is entered in favor of a creditor and against several voluntary donees, contribution among them should be decreed, so that each should pay no more than his just share; but all should be liable, as far as they have received funds from the donor, for the failure of any one to pay his proportion, until the debt is satisfied.

APPEAL from the court of chancery. The opinion states the case.

Wickham, for the appellants.

Leigh, *contra*.

By Court, GREEN, J. The appellee, claiming to be a creditor of Byrd Chamberlayne, prosecuted in the life-time of the latter an action at law against him, which abated by the death of the defendant. The former thereafter prosecuted an action for the same cause against Edward P. Chamberlayne, the administrator of Byrd Chamberlayne; and having obtained a verdict, a judgment was rendered by consent of the parties, to be levied on the goods and chattels of the intestate, then in the hands, or which might hereafter come to the hands of the defendant to be administered, after satisfying thereout all debts of superior dignity and prior judgments. Upon this judgment no further proceedings were had; nor was any execution taken out thereupon. The plaintiff then filed his bill against the administrator *de bonis non* of Byrd Chamberlayne, and the appellants, the children of Byrd Chamberlayne, to whom the latter had, in his life-time, conveyed sundry slaves by several deeds; alleg

ing that those conveyances were voluntary and fraudulent as to the creditors of the donor, and praying that the slaves should be subjected to the payment of his demand. The defendants, claiming under these deeds, insisted on their validity; that the plaintiff had no just demand upon Byrd Chamberlayne; and that the judgment at law was obtained by the collusion and fraud of the plaintiff and the administrator. The plaintiff offered no evidence in support of his demand, other than the record and judgment in the suit at law. That record, independent of the verdict and judgment, affords no proof *per se* of the justice of the plaintiff's demand. The court of chancery declared the deeds to be fraudulent and void, and that the property should be surrendered by the defendant, and sold for the satisfaction of the judgment; from which decree the defendants claiming under the deeds appealed.

It is settled in England, by a series of uniform decisions, that no person, claiming to be a creditor, can impeach in equity, any conveyance fraudulently made by the debtor of his property, until he has established his demand at law, by obtaining a judgment, and by suing out an execution thereupon, if he seeks satisfaction out of the personal property of his debtor. The cases upon this point are cited and commented on by Chancellor Kent, of New York, in 2 Johns. Ch. 144; *Id.* 290; 4 *Id.* 671, 682. If it were otherwise, and any creditor might, in the first instance, question the disposition of his debtor's property in a court of equity, it would produce the greatest inconvenience. The debtor, and a donee claiming under him, would be obliged to litigate at the same time the questions, whether the debt claimed or not, and whether the conveyance was valid or not; and after an expensive and harassing litigation, it might be ascertained that no debt was due. Without a contract for a specific lien, unless in cases where a legal lien exists, a creditor can only assert his claim against the person of the debtor, and cannot claim satisfaction out of any specific property belonging to the debtor, until his property be specifically bound to the satisfaction of the debt, by contract or by judgment, as to lands, or judgment and execution delivered to the sheriff, as to personal estate. The debtor has an unquestionable right to alienate his property *bona fide*, or to prefer one creditor to another. If the creditor had the right to claim satisfaction out of his debtor's property fraudulently alienated, in a court of equity, in the first instance, to give any effect to such proceeding, the creditor must be considered as acquiring, by the

exhibition of the bill, a specific right to be satisfied out of that property; and, if so, a subsequent sale of the property *bona fide* made by the debtor, which, in general, would be valid, could have no effect; and even a subsequent judgment-creditor could not levy an execution upon the property in question. And if several creditors pursued their remedies at the same time in equity, there would be no rule recognized by law by which to ascertain their priorities.

Many other extremely inconvenient consequences would arise from permitting such a proceeding, which need not now be insisted on. Besides, a voluntary and fraudulent conveyance is good between the parties and those claiming under them, and void only as to creditors who are thereby delayed, hindered and defrauded. No creditor can be said to be delayed, hindered or defrauded, by any conveyance, until some property, out of which he has a specific right to be satisfied, is withdrawn from his reach by the fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, and in the case of personal property by execution delivered to the sheriff, and has shown that he is defrauded by the conveyance, in consequence of not being able to procure satisfaction of his debt in due course of a law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed, and shows that he is a creditor, and is delayed, hindered and defrauded by the conveyance. When a party has thus brought himself within the terms of the statute, he is entitled to the assistance of a court of equity, to remove the impediment to his legal rights; and the lien, frustrated by the fraud, will be considered as still subsisting in equity.

A judgment and execution delivered to the sheriff against a fraudulent donor binds personal property in the hands of the fraudulent donee. The execution is against the goods and chattels of the defendant generally; and the conveyance being void, the goods are still the goods of the donor, and may be taken under the execution. But a judgment and execution against the executor or administrator of the donor cannot bind the goods in the hands of the fraudulent donee; since the deed is good between the parties, and those claiming under them. The execution in that case is against the goods and chattels of the testator or intestate in the hands of the executor or administrator to be administered; and such goods are not, even in contemplation of law, in, and never can come to, his hands to be administered.

Although the judgment against the administrator of Chamberlayne in this case did not, therefore, bind the property in question, yet it showed that the plaintiff was a creditor; and the subsequent proceedings in this suit show that he was hindered, delayed and defrauded by the conveyances in question; for the property was thereby withdrawn from the satisfaction of his demand, and no other assets of the debtor remained for his satisfaction.

These proceedings establish those facts against the donees. A judgment against the donor in his life-time would have established the debt against the donees until impeached by them on the ground of fraud, or for any other just cause, insomuch that an execution might be thereupon levied upon the property; and if the donees attempted to impeach the judgment, they must for that purpose have resorted to a court of equity. We can see no reason why a judgment against the legal representative of the donor should not have precisely the same effect. Indeed, in all cases where the question is whether a person be a debtor or not, a judgment against him or his legal representative seems to be *prima facie* evidence of the fact, liable to be controverted upon the ground of fraud, or upon any other just ground, by any one a stranger to the judgment, except, perhaps, in the case of the real and personal representatives of the same person; in which case, either the one or the other might have been sued in the first instance. Thus all creditors are entitled to satisfaction out of the assets of a deceased debtor according to their legal priorities. Each has, therefore, an interest in the question whether the debts claimed by others be due or not; yet a judgment in favor of one binds all others upon the question whether the debt be due or not, unless they can impeach it on the ground of fraud.

So in bankruptcy a judgment against the bankrupt is evidence of the debt against other creditors until impeached. This rule seems to be peculiarly applicable to the case of persons claiming under voluntary conveyances: *Saunders v. ———*, Skinner, 586, cited in 13 Vin. Abr., tit. Fraud, F. pl. 18. The donees have attempted to impeach this judgment, but have failed in their proofs. The fact of the want of other assets (than those conveyed to the donees) to pay the plaintiff's demand, is established in this suit. It is not for the donees to allege that the assets in the hands of the administrator ought to have been applied to the payment of this debt. They were applied to the payment of the debts, and as to the donees, that application

was rightful, and not injurious. It was their right and duty to surcharge and falsify the accounts of the administrator if they were wrong, which they have failed to do.

It was not necessary as a pre-requisite to the maintaining of this suit to have previously established the fact of a deficiency of assets in another suit; or to have bound the property by an action against the donees as executors *de son tort*, proving in that cause that there were no other assets to satisfy the demand, and prosecuting the same to judgment and execution, as might have been done: 13 Vin. Abr., tit. Fraud, C. pl. 5. For all creditors have a specific right to be satisfied out of the property of their deceased debtor in the hands of his executor or administrator, if there be a rightful executor or administrator; or if not, in the hands of his executor *de son tort*; or if as in this case, there be a rightful executor or administrator, and also an executor or executors *de son tort*, out of the debtor's property in the hands of the latter if there be not sufficient assets in the hands of the former.

This is in the nature of a lien; and the executor or administrator, and executor *de son tort*, are in the nature of trustees for the creditors. In general, when there is a rightful executor or administrator, there cannot be an executor *de son tort*, because any person, having possession of the property of the deceased, is responsible therefor to the rightful executor or administrator, and ought not, therefore, to be responsible to creditors also. Otherwise he would be doubly chargeable. But, in the case of fraudulent conveyances the donee in possession is an executor *de son tort*, although there be a rightful executor or administrator. For, as he cannot be made responsible therefor to the rightful executor or administrator, the reason of the general rule fails in that case, and if the donor was not, in such case liable, as executor *de son tort*, the creditor would be without remedy: Roberts on Fraud. Con. 593, and cases there cited: *Pierce v. Turner*, 5 Cranch, 154; *Edwards v. Harben*, 2 T. R.; 11 Vin. Abr. 219, Pl. 9, and notes; 13 Id. tit. Fraud, C. Pl. 5.

The plaintiff, therefore, had a right, without first binding the property otherwise, and without otherwise showing that he was defrauded, in consequence of there being no other fund to satisfy his demand, than the property in the hands of the donees, by another suit, to go originally into a court of equity against the donees as an executor *de son tort*, for a discovery, account and satisfaction, out of the assets in their hands; and, in that suit, to establish his demand, if it had been liquidated,

or was a matter of account, and not before established; and to show that he could not get satisfaction otherwise, and so was hindered, delayed, and defrauded. And this he has virtually done, although he does not call them in terms executors in their own wrong. In this case, a preliminary suit at law against the rightful administrator, or against the donees, was necessary as the claim sounded in damages; and the rightful administrator was properly made a party to account for the assets which had come into his hands. For, if he had had assets to pay the demand, the conveyances would not have been void.

The deeds in question are clearly fraudulent and void as to creditors of the donor. Ali, except that to Evelyn Beverly, in 1793, were executed when the donor was indebted to a degree of embarrassment, and when the very debt, the satisfaction of which is now claimed, was due; and although he retained enough to satisfy all his debts, and lost a large portion of his personal estate afterwards, by a calamitous accident, he had no right to throw upon his creditors the hazard of such an accident, and to provide for his family at their expense. As to the deed of 1793, although it is probable that the donor was largely indebted when he executed that deed, yet there is no sufficient evidence of that fact in this record. And although the donor retained the possession of the property, yet, if the deed had been duly recorded, it might have been valid. But, being recorded on the proof of one witness only, that deed is also fraudulent and void, under that clause of the statute of frauds, beginning with the words, "and moreover." Independent of this clause of the statute, a voluntary conveyance, made by a person not at all indebted at the time, and not in contemplation of future debts, and without any other badge of fraud, would probably be good, notwithstanding the donor retained the possession; for, such possession could be no evidence of an intent to defraud creditors, when none existed, or were in contemplation of the party. But the said clause invalidates even such a conveyance, unless in the case of personal property, the deed be recorded on the acknowledgment of the party, or proof of two witnesses, or unless the possession remain *bona fide* with the donee.

It is also insisted that the donee ought to have been subjected to a ratable contribution, for the satisfaction of the demand of the appellee. At law, persons claiming under voluntary, fraudulent and void conveyances, cannot require a creditor to proceed against them severally for ratable propor-

tions of the debt. He might proceed against them severally, after the death of the debtor, as executor *de son tort*, for the full value of the assets of the debtor in their hands; and the insolvency of one would not excuse any other; and so it should be in equity, if an attempt to equalize the burdens produced any unreasonable delay or detriment to the creditor. But where, as in this case, the creditor has convened all the parties, none of whom are chargeable with actual fraud, and where all the materials for a just apportionment are already in the record, and that can be made without any material delay or injury to the creditor; a court whose maxim is that equality is equity, should apportion the demand amongst the parties responsible thereto; the more especially as, if the burden was unequally borne, and the suffering party could in that event, claim contribution of the others, this would involve those parties in new litigations. But this ought to be done with a reservation of the right to the creditor to resort for satisfaction to all the parties responsible to him, to the full extent of their liabilities respectively, in the event of his failing, from insolvency or any other cause, to procure satisfaction from any of the parties of their due proportions of his demand.

The decree should be corrected in this particular, and the appellants should pay to the appellee his costs, he being the party substantially prevailing.

WHO MAY SET ASIDE A VOLUNTARY CONVEYANCE.—See *Jenkins v. Clement*, ante, 698, and note.

TURNER v. STREET.

[2 RANDOLPH, 404.]

INFANT'S RIGHT OF ELECTION TO TAKE LAND OR MONEY.—If land is devised to be sold, and the proceeds paid to an infant, the infant has the right to take either the land or money; and if the guardian sells the land, and the sale is not advantageous to the infant, a court of equity may elect for him, and bind him by the election.

APPEAL from the court of chancery. The opinion states the case.

Wickham, for the appellee. No counsel appeared on behalf of the appellant.

By Court, GREEN, J. Jedediah Turner devised his land, supposed to contain four hundred acres, to his sister Susanna

Turner, upon one condition, that within a limited time she should pay one third of its value to the children of his sister Polly Atkinson, and one third to the children of his sister Sally Blackwell. But if she failed to pay as aforesaid, then the land was to be sold, and the money divided between Susanna and the children of his other two sisters. Susanna elected to take the land, and pay for it according to the will. Sally Blackwell was appointed guardian of all her children, who were, and still are, infants. The land was valued, and Susanna paid to the children of Mrs. Atkinson what they were entitled to. Blackwell, the husband of Sally, being dead, and indebted to Susanna Turner, as executrix of Jedediah Turner, it was agreed between Susanna Turner, then Dowles, and Mrs. Blackwell, that the debt should be discounted against the sum due to the children of the latter on account of the land; and that Mrs. Blackwell should take, in full of the residue due to her children, one hundred and ten acres of the land which had belonged to the testator.

In pursuance of this agreement Mrs. Blackwell gave to Susanna a receipt in full of the sum due to her children, and the latter gave to the former her bond to convey the said one hundred and ten acres to her when required. This bond does not speak of Mrs. Blackwell as the guardian of her children, but is given to her individually. Mrs. Blackwell was put in possession of the land. The appellee being very desirous to procure this land, and anxious to conceal his wish, employed Austin Thacker to purchase it from Mrs. Blackwell for him. Thacker accordingly treated and agreed with her for the purchase; but before any writings were signed by the parties, Mrs. Turner informed Thacker, in the presence of Mrs. Blackwell, that she had given the land in satisfaction of the sum which she owed to Mrs. Blackwell's children; and insisted, moreover, that the land belonged to the children, and that it had been intended for them. Mrs. Blackwell admitted that it was taken in satisfaction of what was due to her children, but insisted that she had a right to sell it. Mrs. Turner also objected that it was probable that the land would not hold out four hundred acres; and, if so, that the one hundred and ten acres would be more than ought to have been given for the satisfaction of the children's claim; and that the one hundred and ten acres, being assigned for that purpose upon the supposition that the whole tract contained four hundred acres, if it fell short, there ought to be a ratable deduction.

It was, therefore, agreed between Mrs. Turner, Mrs. Blackwell, and Thacker, that a survey should be made, and the one hundred and ten acres be added to, or taken from, in the event of the whole tract containing more or less, in the proportion that one hundred and ten acres bears to four hundred; that Thacker should secure to Mrs. Blackwell the payment of the purchase-money in installments, and that Mrs. Blackwell should convey the land to him. An agreement to this effect was signed by all the parties, which agreement was assigned within a few days to the appellee. Mrs. Turner and Mrs. Blackwell refusing to carry this contract into effect, Street filed his bill against them and the children of Mrs. Atkinson and of Mrs. Blackwell, claiming the specific execution of the contract. Mrs. Turner and Mrs. Blackwell resisted this claim, upon the ground that the land belonged to the children of the latter, and that they had been overreached in the contract. The court of chancery decreed a specific execution of the contract, and the defendants appealed.

Mrs. Blackwell took this land in satisfaction of her children's claim, at twenty-five or twenty-seven shillings per acre, the valuation at which the commissioners, in pursuance of Turner's will, had valued it. She sold it to Thacker at six dollars and twenty-five cents per acre, and pending the suit it is proved to be worth from seven dollars to ten dollars per acre. If, therefore, the children of Mrs. Blackwell had an equitable right to the land, or to the money proceeding from the sale to Thacker, and could assert their claim to the one or the other at their election, no court of equity should have deprived them of that right, unless it appeared to be manifestly for their advantage to confirm the sale; in which case a court of equity could elect for them, and bind them by such election: 1 Fonb. Eq. 88, note f, and the cases there cited; 3 Johns. Ch. 190.

The infant children of Mrs. Blackwell had such right. The property was purchased by their guardian and trustee, exclusively with a fund belonging to them, and both Mrs. Turner and Mrs. Blackwell affirm that it was purchased for them, or rather taken as theirs, in lieu of the money due to them. These facts were distinctly known to Thacker, the acknowledged agent of Street, before he purchased for the latter. It was affirmed by Mrs. Turner; and, although Mrs. Blackwell insisted on her right to sell, she admitted that she had taken the land in lieu of the money due to her children; and the very terms of the contract, signed by Thacker, show clearly that the land was

taken as the due proportion of the children, according to their interest in the whole tract of land.

If, under these circumstances, Mrs. Turner had conveyed to Mrs. Blackwell, and she to Street, the latter would have been a trustee for the children of Mrs. Blackwell. The statute of frauds in England requires that all trusts shall be declared in writing, except such as arise by implication of law, which are thereby left as at common law. By the common law, resulting trusts might be raised and supported by parol proofs. It was at one time doubted whether, notwithstanding the exception of resulting trusts out of the English statute, it was not required by the general spirit of the statute, that resulting trusts, if denied, should be established by written evidence, and not by parol proofs. But the better opinion seems to be that even under the English statute a resulting trust may be raised by parol proofs. It was, however, never doubted that a resulting trust, conferred by the trustee, was valid: 2 Fonb. Eq., book 2, chap. 5, and notes; Bac. Abr. Trust, C. *passim*; *Foster v. Colvin*, 3 Johns. 266. This provision of the English statute of frauds has not been adopted into our code. With us the doctrine of resulting trusts remains as at common law. This, however, is not material in this case, since, even according to the English cases, there would be, in this case, a trust for the children, even if the land had been conveyed as aforesaid. If a man purchase land and cause it to be conveyed to another, there is a resulting trust raised, by operation of law, for the purchaser; and if a trustee purchase property with the trust funds, there is a resulting trust for the *cestui que trust*; so that he may either claim the beneficial right to the property or, at his election, claim a lien upon the property for the security of his money invested in it. In such cases the purchaser even of the legal estate, much more so of a mere equity, from the trustee, with notice of the trust, stands in the shoes of the trustee: See the books before cited.

This last-mentioned case is precisely the case at bar. The proofs in the cause indicate that it is against the interest of the infants to carry the contract in question into specific execution. But this may be otherwise. The proper course was to refer it to a commissioner to inquire and report whether it would be for the interest of the infants to confirm the sale, or otherwise. The decree should, therefore, be reversed, and the cause remanded for further proceedings to be had therein, in conformity to the foregoing views.

All the judges concurred except BROOKE, J., who was absent.

McMAHON v. FAWCETT.

[2 RANDOLPH, 514.]

SURETY'S RIGHT TO SECURITY GIVEN CO-SURETY.—If there are several sureties for one debt, and the principal conveys property in trust to one of them to indemnify him, the others are also entitled to the benefit of the property to indemnify them.

APPEAL from an interlocutory decree of the court of chancery. The principal question raised was whether a trust deed executed by a principal, Ragan, for the indemnity of some of his sureties, could be resorted to by other sureties in ease of their claims. The bill alleged a fraudulent and collusive purchase at a sale under the trust deed, whereby the defendants bought in the land at a figure far below its value. The case bearing upon the point reported is stated in the opinion.

BROWN, Chancellor, held, among other things, that Gambill and Fawcett's deed of trust did not provide any security for their co-sureties for Ragan; so that, whatever moneys were paid by Gambill and Fawcett, in cases where co-sureties were bound with them, over and above their just proportions thereof, unless they were compelled to make such payments, or unless their co-sureties were unable to contribute their proportions, were not properly chargeable on the trust fund.

That the deed of trust under which Gambill and Fawcett claimed did protect them as well against suretyships for Ragan, not particularly specified, as those which were specified therein.

That the sale made under Gambill and Fawcett's deed of trust was not authorized by that deed; because they had never in any sense been compelled to pay any money as sureties of Ragan; the suits having been instituted against them by their own procurement, and the judgments, which they had satisfied, confessed.

That Richard Ragan had a just title to that part of the land held by his son Daniel, which he claimed, and the compromise made with him by Fawcett, according to which one hundred and thirty-seven acres of the land had been released and conveyed to him, was highly beneficial to all parties. And because that compromise depended on the confirmation of the sale under Gambill and Fawcett's deed of trust, and because a majority of the official sureties did not concur in the wish to set that sale aside, but were satisfied with the terms proposed by the defendant, Fawcett, which terms had been suggested by the court and

were approved as reasonable and beneficial to all parties, therefore the court decreed: That the proceeds of sales, after reimbursing Fawcett his expenses and compensation for his trouble, should be applied: 1. To the discharge of prior incumbrances; 2. To the indemnification of Fawcett to the extent to which the court held him entitled to indemnification; and last, to the satisfaction of other incumbrances, in due order and proportion; that Fawcett should render accounts of the subject, taken from time to time; that accounts be taken, before a commissioner, of the moneys already paid by Gambill and Fawcett, and those for which they were yet bound, as Ragan's sureties, showing what portion thereof was justly due by Ragan, for what debts they were sole sureties, and for what they were jointly bound with other sureties; and whether those other co-sureties were solvent; also, accounts of all debts charged on the trust subject; of all debts paid by Ragan's official sureties; of the proceeds of all sales of the trust subject made or to be made by Fawcett; and of all moneys paid by Ragan, as deputy sheriff, to Fawcett, as United States collector, and the appropriation of the same. From which decree the plaintiffs appealed to this court.

Leigh, for the appellants.

Johnson, for the appellees.

By Court, CARR, J. This is an appeal from an interlocutory decree of the Staunton chancellor. The suit was brought by seven out of seventeen of the sureties of D. Ragan, as deputy sheriff of Rockingham, against Fawcett and others, the sureties of the same Ragan in his private capacity. It is a scramble between these two classes of sureties for the wreck of an insolvent's estate. In canvassing the correctness of the chancellor's decree, it may be best to treat the subject in the order he has pursued.

First question. Does the trust deed to Gambill and Fawcett afford protection to those who were bound as sureties with them? The chancellor thinks not. He places it principally on the ground of contract and intention. The deed clearly on the face of it provides only for the payment by Gambill or Fawcett; and an indemnity to them is its sole object. It gives no lien to the other sureties. They are not even parties to it. And here the case differs, in the chancellor's opinion, from *West v. Belches*, 5 Munf. 187, where there was once a lien for the whole debt to both sureties, though that lien was afterwards abandoned by the surety to whom this court gave protection under it. The exam-

ination which I have given to this subject has conducted my mind to a conclusion different from the chancellor's. I think that, both upon principle and authority, the co-sureties have a right to throw the whole burden of the debts upon the subject mortgaged to their body for his security. I do not consider this so much a question of intention or contract, as of the effect of the deed under the influence of those settled principles of equity which bear upon it. All the obligations given by Ragau and his sureties are joint and several. Each is under a several obligation to pay the whole. The creditor may throw the whole burden upon any one of them. The principal has given to two of the co-sureties, Fawcett and Gambill, a deed of trust on land for their indemnity; and if the whole money be made out of either of them, the land must be bound for the whole to indemnify them. Here, then, is the property of the common debtor bound for the debt; and the question is, will not the established principles of equity throw the whole burden upon the fund in case of all the sureties?

There are several rules on this subject which seem to me connected with each other, and resting upon the same general grounds. If B. and C. are bound to A. for a debt, B. as principal and C. as surety, and B. gives C. a mortgage or other lien to secure him, A. can resort to this: 1 Eq. Cas. Abr. 93; 5 Bac. Abr. 168; 11 Ves. 12. Why? Not on the ground of contract, for there is none giving A. a lien; but because it is the property of the debtor, pledged (though not to his creditor) for the debt. So it is with contribution. Our act of assembly, which gives the right to one surety to call on the others, only reduced to statute law what had long been the law of equity. The whole doctrine of principal and surety, with all its consequences of contribution, etc., rests upon the established principles of a court of equity. There is no express contract between the sureties for contribution. It results from the maxim that equality is equity. Again, a surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security, and all means of payment; to stand in the place of the creditor, even as to securities entered into without the knowledge of the surety; having a right to have these securities transferred to him, though there was no such stipulation, and to avail himself of all those securities against the debtor. And the creditor can do nothing to invalidate or discharge the security he has taken from the principal debtor to the prejudice of the right of the surety; and if he has done

such act, and disabled himself from transferring these securities to the surety, he will (unless in so doing he acted without knowledge of the others' rights, and with good faith and just intention) be precluded from so much of his demand against the surety as this latter might have procured if the transfer could have been made; and all this not upon the ground of contract, but upon a principle of natural justice, the same which regulates the doctrine of contribution among sureties. The creditor may resort to either for the whole, or to each for his proportion; and as he has that right, if he, from partiality to one surety, will not enforce it, the court gives the same right to the other surety, and enables him to enforce it. For these principles I refer generally to Poth. on Oblig., No. 427, 496, 519, 520; 2 Vern. 608; 2 Ves. 622; 2 Madd. Ch. 437; 10 Ves. 112; 11 Id. 22; 14 Id. 162; 1 Johns. Ch. 412; 2 Id. 554; 4 Id. 130; 2 Bos. & P. 270.

Let us apply these doctrines. If the creditor has a right to avail himself of any lien given by the debtor to a surety, because it is the property of his debtor pledged to pay that debt, does not a surety stand upon quite as strong ground, when the common debtor has given to a co-surety a lien to secure him? If the surety is entitled to stand in the shoes of the creditor, and avail himself of securities given by the debtor to him, has he not the same right, the same equity, where these securities have been given by the debtor to a co-surety? If equality be the rule, and the debtor shall not be permitted to throw the whole burden on one surety, is it more consonant to natural justice, that the debtor should have this power; that he, for whom all the sureties have become bound, on the understanding of community of burden and risk, and on the faith of the property he then held, should have the power of selecting a favored co-surety, possibly (though the remark cannot apply in this case) the decoy-duck for the rest, and by a conveyance of the common fund for his benefit, leave the others exposed to the payment of the debt without a chance of indemnity? And, if it is not right, that the debtor should thus violate the law of equality, how shall we prevent it, in a case like the present, where the property conveyed to two sureties is sufficient to discharge the debts, for which the whole are bound? How but by throwing the whole burden upon that fund (the property of the common debtor), which has been conveyed for the benefit of these favored sureties? I see no other way.

Suppose, in the cases before us, the creditor had levied his exe-

cution on the property of Fawcett and Gambill, and made the whole money out of them, would equity have permitted them to call on the co-sureties for contributions? No; because they had in their own hands, property of the debtor sufficient to indemnify them. This is most evident from the reason of the case, and from the authority of *McCormick's Administrator v. Obannon's Executor, etc.*, 3 Munf. 484, where it is decided that equity will not compel a surety to contribute, unless it appear that due diligence has been used without effect, to obtain reimbursement from the principal debtor, or that he was insolvent. In one case, Fawcett and Gambill, without waiting to be compelled by an execution, have paid the whole. Does this change the equity of the case? Surely not. They have in their hands a full indemnity; but I have dwelt longer, perhaps, on the subject than I ought, without noticing what I consider a direct authority of this court, on the very point; I mean the case of *West v. Belches*, 5 Munf. 187. I cannot perceive the distinction taken between that case and this. There Belches and Willis were sureties for Grymes; to secure them, he gave them a lien on two negroes. Belches afterwards consented to cancel this lien, and that Grymes should execute another on all his personal estate, for the payment of certain debts, and among them this one, for which Willis and Belches were sureties. Grymes's personal estate proved insufficient to pay the debts, and an execution was levied on the property of Belches; he filed his bill to stay proceedings, and for general relief. The court say: "Admitting that Belches consented that upon the execution of the deed to Hughes and Camp (the second deed of trust), his own lien on the negroes should be released; he did not release, nor was he competent to release it, as it relates to Willis, who was no party in the transaction.

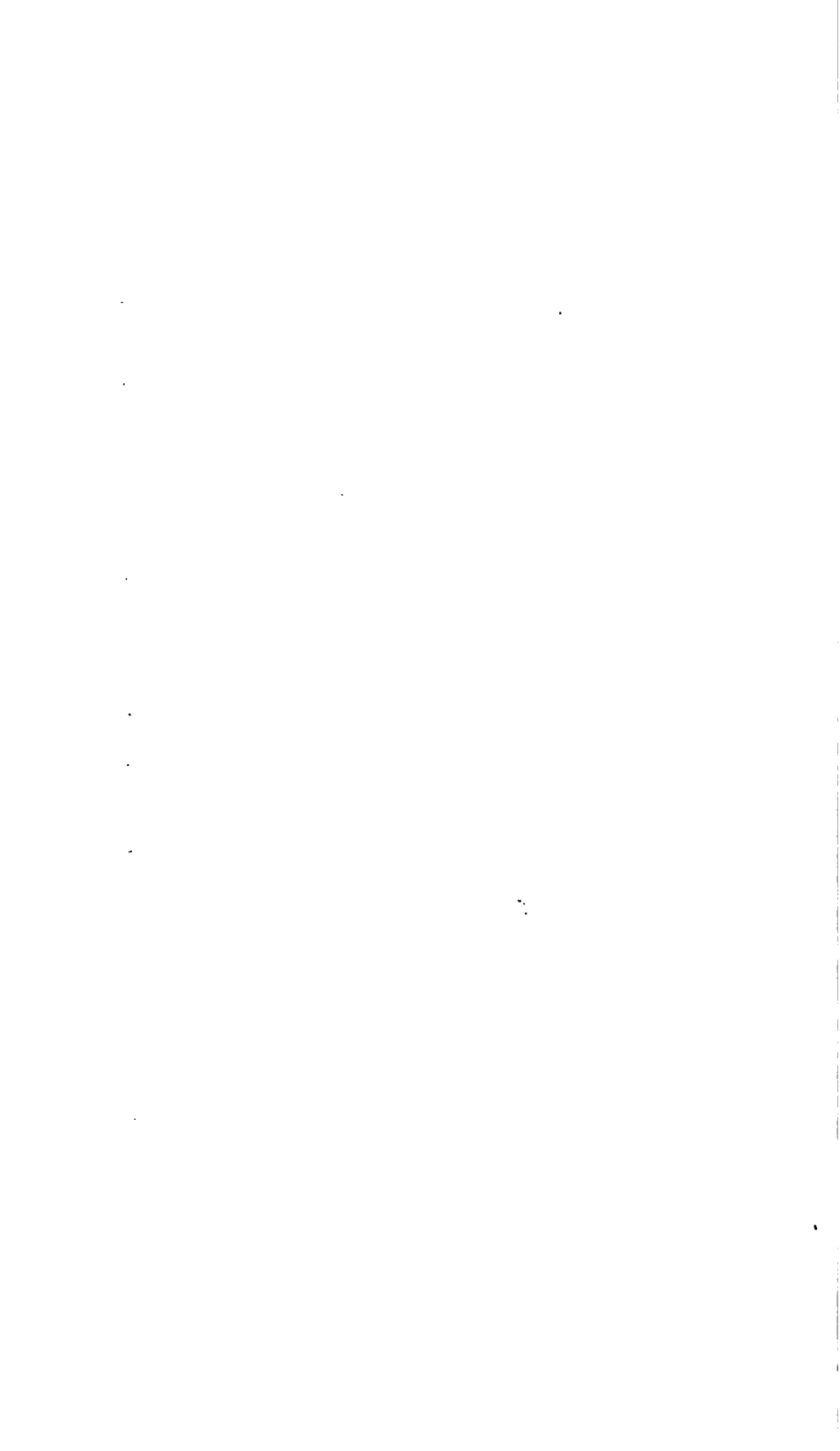
As to Willis, therefore, the said deed is still in full force. The court is of opinion that even if Willis had been no party to the judgment sought to be enjoined, nor to the execution, it would be competent to Belches, after paying off the same, to resort to him as a co-surety for contribution of a moiety thereof; and that for the purpose of preventing circuity, and getting payment out of the proper fund, it would be also competent to him, as standing in the place of Willis, to go for the said moiety against the negroes conveyed by the said deed. The court is also further of opinion that under that hypothesis, it would be competent for the appellee (Belches) to stand in the place of Willis, and charge the said negroes for the whole sum.

Nothing is more consonant to natural justice than that the proper debts of every man should be paid out of his own estate, in ease of innocent sureties, and that that property of his in particular should be subjected which has been bound thereto by a specific existing lien. These principles will avail the appellee (*Belches*) supposing him to have released for himself, his own proper lien, created by the first deed."

The principles here laid down by this court, seems to me to be the very principles which I have been laboring to show, from other sources, are the established doctrines of equity. And this is still more clear, from the reference in the same opinion, to the case of *Eppes v. Randolph*, 2 Call. 125, where a surety, discharging the debt of a bond creditor, is put in his place, and gives access to the land; the court declaring that the doctrine of substitution established in that case, fully supported the decision in *West v. Belches*. The chancellor seemed to think that however the court might give the co-sureties indemnity out of the trust fund, if the question were between them and the debtor alone, it could not do so when the debtor had parted with his interest to subsequent incumbrancers, who were also innocent sureties. I cannot think that this makes a difference. So soon as Ragan executed the deed for the benefit of Fawcett and Gambill, the principles of equity attached, and the rights of the co-sureties accrued. Nor could any subsequent act of Ragan's detract from those rights, or affect the application of those principles. After the execution of the deed nothing resided in Ragan but an equity of redemption. He could convey no more to the subsequent incumbrancers; and they could only come in upon the ground of redeeming all prior incumbrances to the full extent which these had when their deed was executed. But besides this reasoning, there is in the same case of *West v. Belches*, authority for this position. There, as well as here, was a second incumbrance, no way impeached; yet it was not thought to limit or narrow at all the rights or equity of the co-surety. I conclude, therefore, that the deed of trust from Ragan to Fawcett and Gambill, rendered the land liable for the whole of the debts, in ease of their co-sureties.

[Several other points were considered by the court, but not being necessary to the decision of the principal question, are omitted].

Decree reversed and bill dismissed.



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3. **PRESCRIPTION MAY BE FOUNDED** on a void deed and possession taken and continuously held thereunder. *Ferguson v. Kennedy*, 761.
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2. **HAY IN A BARN MAY BE ATTACHED**, and may also be removed, if necessary for its security. *Barrett v. White*, 352.
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2. **DUTIES OF COUNSEL, IMPORTANCE OF.**—The preparation of a chancery cause for trial is the most important of a counsel's duties, and the argument is among the least important. *Id.*
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 4. AN AGREEMENT TO ARBITRATE does not oust courts of their jurisdiction. *Allegre v. Maryland Ins. Co.*, 289.
 5. ARBITRATION, WHAT MAY BE SUBJECT OF.—Parties who are competent to transfer real property, or exercise acts of ownership over it, may refer their disputes concerning it, to arbitrators. A claim to dower may, therefore, be submitted to arbitrators. *Cox v. Jagger*, 522.
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 10. AWARDS, HOW CONSTRUED.—If two parts of an award are irreconcilable, the first prevails. *Id.*
 11. AWARD, IMPEACHING.—An award, if good upon its face, can be impeached only by showing misconduct in the arbitrators. If, on the face of the award, it appears that improper testimony was received, it may be set aside; or if a mistake of fact appears by the award or is confessed by the arbitrators, the matter may be recommitted to them; but the court cannot, by extrinsic evidence, inquire into the justice of the award. *Jocelyn v. Donnel*, 753.
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CONSTITUTIONAL LAW.

1. RETROSPECTIVE STATUTE.—An act repealing a statute of limitations is, with respect to actions pending which are barred by the statute, retrospective, unconstitutional and void. *Wheat v. Winnick*, 384.
2. PAPER MONEY and the colonial tender laws considered, and their history given, for the purpose of determining the evils intended to be remedied by article 1 of section 10 of the constitution of the United States. *Townsend v. Townsend*, 722.
3. EXECUTION, SUSPENSION OF—CONSTITUTIONAL LAW.—A statute directing that upon any judgment thereafter obtained execution shall not issue until two years after the rendition of the judgment, unless the plaintiff shall indorse upon the execution that satisfaction may be received in notes of the State Bank of Tennessee and its branches, and the Nashville Bank and branches, is unconstitutional and void. *Id.*
4. OBLIGATION OF CONTRACTS.—If, when a contract is made, the creditor has the right to immediate execution, payable in money, a statute subsequently passed suspending the right to execution for two years, or making the contract payable in something else than money, is void, because it attempts to impair the obligation of a contract. *Id.*

5. **REMEDIES, POWER TO ALTER.**—The legislature may alter remedies; but the alteration must not, so far as prior contracts are concerned, appear on the face of the statute to be enacted to render the remedies less efficient or more dilatory than those in force when the contract was made. *Id.*
6. **RETROSPECTIVE LAWS.**—The provision of the constitution of Tennessee forbidding retrospective laws considered, and held to prohibit laws impairing existing rights, but not to extend to laws preserving rights from destruction. *Bell v. Perkins*, 745.

CONTRACTS.

1. **ELECTION, CONTRACT FOR SERVICES AT.**—A note given in consideration that the payee will give the maker his interest in an ensuing election for sheriff, is void. *Swayze v. Hull*, 398.
2. **IN CONSTRUING CONTRACTS**, the situation of the parties, and the subject of their transactions should be considered. *Wilson v. Troup*, 458.
3. **DRUNKENNESS**, short of deprivation of reason, will not avoid a contract, unless it was brought about by one of the contractors, for the purpose of obtaining an advantage of the other. *Woodson v. Gordon*, 743.

See CONSTITUTIONAL LAW, 3; FRAUD, 1.

CONTRIBUTION.

See FRAUDULENT CONVEYANCES, 13.

CONVERSION.

See EQUITABLE CONVERSION; GUARDIAN AND WARD, 1.

CORPORATIONS.

1. **STOCKHOLDER'S LIABILITY FOR UNPAID INSTALLMENTS.**—The assignee of shares of the capital stock of a corporation upon which some installments remained due, will be liable therefor, in a suit by the corporation. *Bend v. Susquehanna Bridge, etc. Co.*, 261.
2. **AN ASSIGNMENT OF STOCK ABSOLUTE ON ITS FACE** cannot be shown by parol to have been intended as a mortgage. *Id.*
3. **CORPORATE SEAL.**—A corporation may use any seal; but whatever seal it uses must be shown to have been adopted by the corporation and affixed by the proper officer. If the seal used is not shown to have been adopted by the corporation, the instrument is invalid, although a majority of the directors hold a meeting, at which they undertake to ratify "the execution of the writing." *Perry v. Price*, 316.
4. **TRANSFER OF STOCK.**—If an act provides that a transfer of stock shall not be valid until registered on the books of the corporation, this provision is for the benefit of the corporation, and an unregistered transfer is valid between the parties thereto. *Bank of Utica v. Smalley*, 526.
5. **PROOF OF CORPORATION, WHEN REQUIRED.**—When a corporation sues, and the general issue is pleaded, it must prove that it is a corporation. *Id.*
6. **INCORPORATION, AVERMENT OF.**—A corporation, in suing, need not aver how it was incorporated. *Id.*
7. **MINORER OF A CORPORATION, PLAINTIFF**, is no ground for a nonsuit. It can be taken advantage of only by a plea in abatement. *Id.*

8. **JOINT POWER, HOW MAY BE EXECUTED.**—If the president and cashier of a bank jointly have the power to borrow money or obtain discounts, and they both agree upon the plan of borrowing the money or obtaining the discount, it is not necessary that both should sign the paper, to carry their plan into effect. *Ridgeway v. Farmers' Bank*, 681.
9. **POWERS OF DIRECTORS.**—An act of incorporation stating that "the affairs of the company shall be conducted by the directors," gives them power to authorize the president and cashier to borrow money. *Id.*
10. **CORPORATION MAY ACT WITHOUT A RESOLUTION.**—It is proper to leave it to the jury to determine from the evidence, independently of any resolution of the board of directors, whether they had directly or indirectly sanctioned an act done by their agent. *Id.*
11. **DIVIDENDS, APPORTIONMENT OF.**—A person who was entitled for life to dividends on certain bank stock, "to be paid half yearly as they shall be received from the bank," having died just before a semi-annual dividend was declared, it was held that the dividend should be apportioned and a part paid to his executor. *Ex Parte Rutledge*, 696.

See EVIDENCE, 14.

COSTS.

See RELEASE, 3.

COUNTERFEITING.

See CRIMINAL LAW, 8.

COURT COMMISSIONERS.

1. **POWERS OF.**—Commissioners appointed in chancery, *pro hac vice*, may be empowered to ascertain and report boundaries, or any other matter of detail, ascertainable by calculation and resulting from matters in contest, to the ascertainment of which the attention of the parties has not been directed by the pleadings; and their report, if not excepted to, will be deemed correct. *Farmer v. Samuel*, 106.
2. **ACCOUNT OF RENTS AND PROFITS** may be taken by a commissioner, as well as by jury. *Newman v. Chapman*, 766.

COURTS.

DECISIONS OF SUPREME COURT OF THE UNITED STATES, upon general questions, ought to be followed by the state courts. *Bell v. Perkins*, 745.

See ORPHANS' COURT; PLEADING AND PRACTICE.

COVENANTS.

1. **A COVENANT OF GENERAL WARRANTY** passes in a deed of conveyance without warranty so as to enable the second grantee to maintain an action for the breach of the covenant against the original grantor. *Cummins v. Kennedy*, 45.
2. **BREACH OF COVENANT OF WARRANTY.**—Where, at the time of a conveyance with warranty, the land was in the possession of adverse claimants, a recovery by them in an action of ejectment by the grantee will be a breach of the warranty. *Id.*

3. **DAMAGES**.—The value of the land at the time of the conveyance, with interest and costs, is the measure of damages for the breach of a covenant of warranty. *Id.*
4. **THE PRICE ACTUALLY PAID**, although paid before the execution of the deed when the land may have risen in value, is the best evidence of its value. *Id.*
5. **UPON AN EXCHANGE OF LANDS**, the value of the tract conveyed, and not that of the tract received, is the criterion of damages. *Id.*
6. **WARRANTY, EFFECT OF**.—A sale of land with warranty, operates to convey such title as the grantor may thereafter acquire. *Williams v. Gray*, 234.
7. **A CONVEYANCE BY ONE CO-TENANT** to another, for the purposes of partition, with a special covenant of warranty, will estop the grantor from asserting a title acquired subsequent to the conveyance and based on a tax sale made prior thereto. *Id.*
8. **THE WORDS GRANT, BARGAIN AND SELL**, by operation of the statute, are a covenant against all incumbrances done or suffered by the grantor. This covenant, if broken at all, is broken the moment it is entered into. *Funk v. Voneida*, 617.
9. **THE SPECIAL COVENANT** arising from the use of the words grant, bargain, and sell is not impaired by a general covenant, not inconsistent therewith, nor by the fact that the incumbrances made by the grantor are duly recorded. *Id.*
10. **COVENANT AGAINST INCUMBRANCES, ACTION ON**.—If there is an existing incumbrance when the deed is made, the covenant against incumbrances is at once broken; but no more than nominal damages can be recovered until the grantee has removed the incumbrance, or called on the grantor to do so, or has suffered loss from it. The grantee may remove the incumbrance before it is due, and if he does so, may recover of the grantor the amount necessarily paid to effect such removal. *Id.*
11. **THE ACTION OF WARRANTIA CHATÆ** described. *Id.*

CRIMINAL LAW.

1. **MERGE OF CIVIL INJURY**.—Where a felony is committed which includes a civil injury, the latter merges in the former. *Foster v. Tucker*, 243.
2. **STOLEN GOODS** cannot be reclaimed by action; nor can trover be sustained therefor until after conviction of the thief. Assumpsit cannot be maintained even after conviction. *Id.*
3. **INDICTMENT FOR FORGING A LOST INSTRUMENT**, or an instrument in the possession of the accused, is sufficient if it describe the instrument in general terms, and set forth the excuse for not setting out a copy, or describing the instrument more particularly. *People v. Kingsley*, 520.
4. **FORGERY—EVIDENCE**.—On the trial of an indictment for forgery, if it appear that the instrument is lost, destroyed, or in the possession of the accused, secondary evidence may be given of its contents. *Id.*
5. **INDICTMENT—TIME MUST BE STATED**.—An indictment must state the day and year on which the offense was committed. If it state an impossible or a future date, this is fatal. *State v. Sexton*, 584.
6. **AMENDMENT OF INDICTMENT** can not be made without the concurrence of the grand jury by which it was found. *Id.*

7. **SELLING UNWHOLESOME PROVISIONS** is an offense indictable at common law. *State v. Smith*, 594.
8. **TO UTTER AND PUBLISH A COUNTERFEIT NOTE** of a private unauthorized banker, knowing it to be counterfeit, is an indictable offense. *Butler v. Commonwealth*, 679.

DAMAGES.

See COVENANTS, 3, 4, 5.

DEEDS.

1. **DELIVERY.**—Handing a deed to the grantee to be put into a trunk containing the joint papers of the grantor and grantee, they being partners, and the grantor keeping the key, is not a valid delivery. *Chadwick v. Webber*, 222.
2. **SAME—WHAT IS NOT.**—Where a grantor sent his deed to be recorded, declaring that it was made to prevent the lands being taken for an unjust debt, the grantee having no knowledge of the conveyance until after the grantor's death, it was held not to amount to a delivery. *Barns v. Hatch*, 369.
3. **WHAT WILL PASS REAL ESTATE.**—An assignment of "all debts, dues or demands wheresoever and whatsoever, real, personal, or mixed, which are due and owing, or of right belonging to me, either by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise," passes real estate. *McWilliams v. Martin*, 688.

See FRAUDULENT CONVEYANCES; RECORDING, 2.

DIVORCE.

1. **HISTORY OF THE EARLY DIVORCES** and divorce law of New York stated. *Burtis v. Burtis*, 563.
2. **THE ENGLISH LAW OF DIVORCES** is the ecclesiastical, and not the common law of that country. It was never adopted in this state. *Id.*
3. **CAUSES FOR DIVORCE** are such only as are specified in the statute of this state. *Id.*
4. **CORPORAL IMPOTENCE**, not being recognized in the statute as a ground of divorce, this court has no authority to adopt the law of England or any other country, and grant a divorce on such ground. *Id.*

DOWER.

See ARBITRATION AND AWARD, 8.

ELECTIONS.

See CONTRACTS, 1.

ENTRY.

1. **CONSENT TO ENTRY THROUGH MISTAKE.**—Where a defendant in a judgment in ejectment, through mistake of his rights, consents to the plaintiff's entry after expiration of the demise laid, such consent being binding until avoided, creates a tenancy at will, and upon the sudden determination of the tenancy, the tenant has a right to reap a crop already sown. *Smith v. Hornback*, 122.

2. AN ENTRY AFTER THE EXPIRATION OF THE DEMISE, with the defendant's oral consent, does not extinguish his right, and cannot operate to transfer his interest for a longer period than one year. *Id.*
3. AN ENTRY BY AN INFANT, having no father, but living with his mother, will be presumed to be in his own right until the contrary appears. *Riley v. Jameson*, 325.

EQUITABLE CONVERSION.

See EQUITY, 4.

EQUITY.

1. RELIEF AGAINST IMPOSITION AND OPPRESSION may be obtained in chancery, even by setting aside deeds and judgments; but the applicant must do equity, must be guiltless of fraud and chicanery; must not have been guilty of delay to the prejudice of others, and the hardship complained of must not be the result of his own misconduct. *McDonald v. Neilson*, 431.
2. THE EQUITY POWERS of the courts of law in Pennsylvania considered. *Funk v. Voneida*, 617.
3. CARRYING DECREE INTO EFFECT.—Courts of equity have the authority to carry their own decrees into effect. *Newman v. Chapman*, 766.
4. CONVERSION OF REALTY INTO PERSONALTY.—Where land is directed to be sold on a certain condition, it is not thereby converted into personal estate; but, if a valid sale is made, the surplus proceeds must be treated as personalty. *Evans v. Kingberry*, 779.

See BONA FIDE PURCHASERS; JUDGMENTS, 10, 11; JURISDICTION, 2; MERGER, 8; SET-OFF, 1; VERDICT.

ESCHEAT.

See REAL ESTATE, 1.

ESTOPPEL.

1. OF LESSEE.—A lessee for years by indenture is estopped to deny his lessor's title only during the term. *Carpenter v. Thompson*, 348.
2. ESTOPPEL AGAINST ESTOPPEL sets the matter at large. *Id.*
3. CONVEYANCE BY AN HEIR APPARENT estops him from recovering the property, when it subsequently descends to him. *McPherson v. Cunliff*, 642.
4. ESTOPPELS OF VARIOUS KINDS explained and commented upon. *Id.*
5. AGAINST HEIRS AT LAW.—An heir at law may be estopped by his acts, or by a judicial proceeding to which he is a party, or by receiving the benefits of a transaction or proceeding. *Id.*
6. FROM PROCEEDINGS OF COURTS OF PECULIAR JURISDICTION.—If any matter belongs to the jurisdiction of one court so peculiarly, that other courts can only incidentally or indirectly take cognizance of the same subject, the latter are bound by the sentence of the former. *Id.*

See COVENANTS, 7; REAL ESTATE, 2; STATUTE OF FRAUDS, 1.

ESTATES OF DECEASED PERSONS.

HEIRS, WHEN LIABLE FOR DEBT OF ANCESTOR.—A suit in equity may be maintained against heirs where there has been no administration, to com-

pel them to pay a debt due from their ancestor out of the assets received by them from him. *Adams v. Holcombe*, 719.

EVIDENCE.

1. THE RECORDER'S CERTIFICATE THAT A DEED has been recorded pursuant to the requirements of the law, is sufficient to entitle the deed to be read in evidence without further proof of its execution. *Sharp v. Wickliffe*, 37.
2. DECLARATION BY THE GRANTOR, after conveyance, and tending to defeat his title are not evidence. *Id.*
3. TO RENDER ADMISSIBLE A COPY of a lost instrument which, if produced, would not be admissible without proof of its execution, it is essential that the execution of the original be proved. *Eltendorf v. Carmichael*, 86.
4. A COPY OF A WILL executed in a foreign country, sworn to be a true copy by one of the attesting witnesses, who also testified that the will was attested by two others in the presence of the testator, that he acknowledged the will to be his, and that he was of disposing mind, is admissible. *Id.*
5. RECITALS IN PRIVATE STATUTE are evidence between the applicant and the commonwealth, but not between the applicant and other individuals. *Id.*
6. PROOF OF INTEREST OF WITNESS.—A witness's declaration out of court is incompetent to prove his interest; but to exclude him his interest should be established by his oath on his *voir dire*, or by other competent evidence. *Jones v. Tevis*, 98.
7. HEARSAY EVIDENCE.—The declarations of a father made before the cause of action arose, concerning the age of his child, are admissible in evidence. *David v. Sittig*, 179.
8. A VENDEE'S CONSENT to a conveyance may be shown *dehors* the instrument, as by his afterwards conveying part of the same land. *Baudin v. Roliff*, 181.
9. DECLARATIONS OF A VENDOR, not made in the presence of the vendee, are competent to show the fraudulent intent of the former in making a conveyance to the latter. *Guidry v. Grivot*, 193.
10. DECLARATIONS OF THE ANCESTOR, under whom both parties claim, unaccompanied by any act, showing what disposition he had made or intended to make of his estate, are not evidence. *Chadwick v. Webber*, 222.
11. DEPOSITION, TIME OF TAKING.—If the notice states that the deposition will be taken between the hours of ten o'clock A. M. and six o'clock P. M., the deposition should not be admitted in evidence, if the certificate shows it to have been taken between eight o'clock A. M. and six o'clock P. M. *Kean v. Newell*, 321.
12. CREDITOR AS SUBSCRIBING WITNESS.—In a writ of entry against the administrator of a deceased insolvent, upon an instrument purporting to be the intestate's deed, the sole survivor of the subscribing witnesses, although a creditor of the intestate, must be called by the demandant to prove the deed, since he has no interest in the event of the suit. *Barns v. Hatch*, 369.
13. PRESUMPTION.—A legal act is presumed to be done for a legal purpose, until the contrary is made to appear by satisfactory evidence; but if it

be shown to be done for an illegal purpose, equity will restrict its operation to the objects which might legally be accomplished by it. *McDonald v. Neilson*, 430.

14. CORPORATION—EVIDENCE AGAINST.—The declarations of the officers of a bank are not evidence against it, if unauthorized by the board of directors. *Stewart v. Huntingdon Bank*, 628.
15. IRRELEVANT EVIDENCE read to the jury on the promise of counsel, that he will follow it up so as to make it relevant, must not, when not so followed up, be argued upon by counsel, nor given to the jury for consideration. *Id.*
16. DECLARATIONS AS EVIDENCE.—In trying the question whether the bond on which judgment was entered was given to defraud creditors, the declarations of the defendant, made in the absence of plaintiff, are inadmissible. *Whiting v. Johnson*, 633.
17. AN ACKNOWLEDGMENT OF PAYMENT contained in an agreement for the conveyance of land, while admissible, is not conclusive evidence of payment. *Watson v. Blain*, 669.
18. EVIDENCE OF PUBLIC DOCUMENTS, AND OF BOOKS OF CORPORATIONS.—Where an original document is of a public nature, an examined copy thereof is admissible as evidence; but this rule does not apply to the books of an ordinary private corporation. *Ridgeway v. Farmers' Bank*, 681.
19. DECLARATIONS OF GRANTOR to show what he intended to pass by his deed are inadmissible. *McWilliams v. Martin*, 688.
20. IMPRACHING CREDIBILITY OF DEFENDANT.—If a defendant files a verified answer in equity, evidence may be received to impair the force of the answer as evidence, by showing that he is unworthy of belief. *Miller v. Tolleson*, 711.
21. NOTARY'S RECORD AS EVIDENCE.—A marginal entry in the book of a deceased notary, opposite the protest of the dishonor of a bill stating "indorser duly notified in writing," is admissible as evidence.

See GUARDIAN AND WARD, 8; INSURANCE, 5; JUDGMENTS, 2.

EXECUTIONS.

1. SELLING PROPERTY OF STRANGER ON EXECUTION.—Where a sheriff, on execution, sells the property of a stranger without the creditor's authority or knowledge, and the true owner afterwards recovers the property, the creditor is not liable at law or in equity to refund the purchaser his money; but the sheriff, himself, is liable; and the judgment-debtor, though not liable at law, unless he was accessory to the taking of the property, is liable in equity, because the purchaser has discharged so much of his debt. *McGhee v. Ellis*, 124.
2. RETURN BARS SECOND EXECUTION.—The sheriff's return, in such a case, that he has collected so much of the judgment, or sold property to that amount and taken the purchaser's bond, cannot be set aside in equity, and is a perpetual bar to a second execution therefor. *Id.*
3. EXECUTION ISSUED AFTER A YEAR is voidable as to the sheriff, but void as to the plaintiff, and will not justify an entry; and an attornment thereunder by the tenant in possession is void. *Hoakins v. Helm*, 133.

4. **SHERIFF'S SALE—PAYMENT OF BID.**—The judgment-creditor may waive the payment of the bid, and receipt for the purchase-money without payment in cash, and if so the sale is valid. *Baudin v. Roliff*, 181.
5. **SHERIFF'S SALE OF CHATTELS.**—The sheriff must be allowed much discretion; and this discretion must be exercised honestly and soundly, with a view of making the most out of the property. That the property is not present at the sale does not necessarily render it fraudulent or void. *Kean v. Newell*, 321.
6. **FRAUD IN SHERIFF'S SALE** does not prejudice an innocent purchaser at the sale, nor even the innocent vendee of a purchaser *malis fide*. *Id*.
7. **SHERIFF'S DUTIES WHEN ACTING UNDER EXECUTION.**—An officer having a writ in his hands, must take all needful and lawful means to enforce it. He must exercise a sound discretion as to time, place and manner of sale; and he must consult his own judgment and not submit to be so controlled by either party as to oppress or ruin the other. *McDonald v. Neilson*, 430.
8. **CONTRACT PROCURED BY OPPRESSION** of the plaintiff and an officer acting under a writ of execution, will be relieved against in equity, by requiring it to be delivered up and canceled on payment of the amount due on the execution, and of all other demands which are equitably due to the plaintiff. *Id*.
9. **INSTRUCTIONS BY PLAINTIFF** in execution need not be obeyed by the sheriff, if they are oppressive or will produce a great sacrifice of property. *Id*.
10. **POSTPONEMENT OF SHERIFF'S SALE** should be made even against the objections of the plaintiff, if necessary to prevent a sacrifice of the property. *Id*.
11. **DUTY OF OFFICERS IN EXECUTING PROCESS.**—The law will make liberal intandments in favor of ministerial officers, but will not sustain them in a needless resort to extreme and oppressive measures. *Id*.
12. **DUTY OF SHERIFF** is to obey *feri facias* by having the money at the return day; to show no favor; to permit no unreasonable delay; and to be guilty of no oppression or needless severity. *Id*.
13. **PROPERTY NOT SUBJECT TO EXECUTION AT LAW**, such as choses in action, can not be reached in equity, unless the case is otherwise of equitable jurisdiction, as where the property was fraudulently converted into choses in action to defraud creditors. *Donovan v. Finn*, 531.
14. **SHERIFF'S SALES.**—The duty of the sheriff is to conduct the sale in such a manner as will produce the most money. *Wilson v. Twitty*, 569.
15. **SALES, EN MASSE.**—A sale *en masse* of two tracts, near to but not adjoining each other, is not void. If the defendant acquiesces in the sale, and does not move to vacate it, he cannot recover the lands sold. *Id*.
16. **FAILURE TO SELL PERSONALTY** before resorting to real estate, if occasioned by the defendant, is not a ground on which to impeach the sale. *Id*.
17. **TAX LEVY UPON REALTY**, in preference to personalty, is not a matter for complaint on the part of the plaintiff, if he gets his judgment satisfied. *The Governor v. Carter*, 588.
18. **THE SHERIFF IS NOT LIABLE** if the property, when levied on, is sufficient to satisfy the writ, though before the sale it depreciates so as to become insufficient. *Id*.

19. **SHERIFF'S DUTY—BANK NOTES.**—A sheriff is not liable for an insufficient levy, if the property seized was sufficient to pay the debt if sold under execution for current bank notes. *Id.*

See EXECUTORS AND ADMINISTRATORS, 5.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTOR DE SON TORT**, is one who takes possession of the goods of a decedent without color of title; otherwise if there is color of title. *Johnson v. Duncan*, 54.
2. **THE ADMINISTRATOR'S ASSENT** to a suit at law, by the heir, for the recovery of a slave, is necessary. Where the assent is not given, the heir may bring a suit in chancery against the holder of the slave and the administrator. *Thomas v. White*, 56.
3. **ADMINISTRATOR IS NOT LIABLE FOR NEGLECTING TO SUE**, unless he acted with bad faith, or was guilty of willful default or gross negligence. *Id.*
4. **DIVISION OF STATE.**—LETTERS OF ADMINISTRATION GRANTED by Virginia prior to the separation of Kentucky, will entitle the administrator to maintain an action in the latter state as though no separation had taken place; it is a right secured by the constitution. *Id.*
5. **EXECUTION ON JUDGMENT AGAINST ADMINISTRATOR.**—On a judgment against an administrator (upon a plea of no assets) to be levied out of goods and chattels thereafter coming to his hands, execution cannot issue without a *scire facias*. *Ewing v. Handley*, 140.
6. **A BILL FOR THE DISCOVERY OF ASSETS** will lie in such a case, and is indispensable where property has been fraudulently conveyed by the intestate, preventing a recovery by the administrator, who cannot sue therefor under the statute of frauds. *Id.*
7. **DEFECTIVE DECREE AGAINST ADMINISTRATOR.**—A decree against an administrator, merely declaring slaves not in his possession, assets in his hands, but not subjecting them to sale to discharge the debt or directing those, in whose possession they are, to surrender them, is defective. *Id.*
8. **RELEASE BY ONE EXECUTOR** of a money demand is good, but where there is a contract with the testator for land or money in the alternative, the power of one executor to release depends on the impossibility of obtaining the land. *Id.*
9. **A PETITION TO DISMISS, BY ONE EXECUTOR**, should not be allowed, where the other objects, and there are questions involved which should not be decided on motion. *Id.*
10. **VERDICT AND JUDGMENT AGAINST ADMINISTRATORS** are *prima facie* evidence against heirs, so far as the personality is concerned. Hence they can not, in equity, have such judgment reduced as being for too much, except where the administrators could do so. *Id.*
11. **EXECUTORS—TITLE OF.**—At law the executor becomes for most purposes the owner of the legal title to the goods of his testator, and may dispose of them as if they were his own, except that he can not bequeath them, nor can they be taken on execution for his debt. In equity he is treated as a trustee for the creditors and legatees. *Petrie v. Clark*, 636.
12. **IDEM—REMEDY FOR CHATTELS FRAUDULENTLY DISPOSED OF BY.**—If an executor disposes of goods to one who is not a purchaser, for a valuable consideration, or who is guilty of fraud or collusion with the executor,

the remedy of the creditors and legatees is in equity where the person so acquiring the goods will be decreed to hold as their trustee and for their benefit. *Id.*

13. **IDEM—A PURCHASER FROM AN EXECUTOR** is not bound to see to the application of the purchase-money. *Id.*
14. **IDEM—PLEDGE OF ASSETS.**—If an executor deliver to one of his creditors a note belonging to the decedent as security for a note made by the executor in place of a prior note given by him to the same creditor, the latter is not a holder for value of the note so pledged to him, and cannot retain it as against the creditors of the decedent. *Id.*

See GUARDIAN AND WARD, 2, 3; STATUTE OF LIMITATIONS, 1.

FEMES-COVERT.

SOLE TRADER.—A husband may lawfully, by deed, constitute his wife a sole trader; but, if made a sole trader while the husband's affairs are embarrassed, and if she pursues no separate business, but purchases valuable property, she is bound to show from what funds she made the purchases, or they will be declared fraudulent and subjected to the satisfaction of her husband's creditors. *Miller v. Tollison*, 711.

FIXTURES.

1. **THINGS PERSONAL** may become part of the realty: 1. By incorporating them therewith for permanent use; 2. By annexation for any object in such a manner that they cannot be removed without dilapidation, or injury to the inheritance. *Hunt v. Mullanphy*, 300.
2. **IDEM—INTENT IN ANNEXING.**—When property, personal in its character, is claimed as a part of the freehold, the claimant must show such facts and circumstances as will clearly indicate that the owner intended to change the character of the property from personalty to realty. *Id.*
3. **IDEM—RULE BETWEEN GRANTOR AND GRANTEE.**—The right of the grantee to things of a personal character must be established by showing that they were, in the deed, treated as real estate. *Id.*
4. **IDEM—FOR TRADE.**—Annexations for the purpose of trade or manufactures, are of a personal character, and do not become a part of the realty. *Id.*
5. A **BOILER** situate in a house on mortgaged premises, made of copper, and built into a furnace erected for that purpose, but capable of removal without injury to the building, is not a fixture, and does not pass to the mortgagee. *Id.*
6. **MANURE LYING ABOUT A BARN** passes to a grantee of the land as an incident thereof, unless reserved in the deed. *Kittredge v. Woods*, 393.

FORCIBLE ENTRY AND DETAINER.

See LANDLORD AND TENANT.

FORGERY.

See CRIMINAL LAW, 3, 4.

FRAUD.

1. **AN AGREEMENT PROCURED BY MISTAKE OR FRAUD** is not void but voidable only. *Smith v. Hornback*, 122.

2. **FRAUD IS NEVER PRESUMED**, and if a deed is alleged to be fraudulent, the allegation can be sustained only by showing fraud in both the vendor and the vendee. *Baudin v. Roliff*, 181.
 3. **JURISDICTION IN CASES OF FRAUD**.—Courts of law, as well as of equity, have cognizance of fraud; but courts of law relieve against it negatively, by inquiring into the circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained. Principle applied to a parol agreement between the purchaser at an execution sale and the defendant, whereby the land was to be bought for the latter's benefit. *Lamborn v. Watson*, 275.
- See **EXECUTIONS**, 6; **EXECUTORS AND ADMINISTRATORS**, 12; **FRAUDULENT CONVEYANCES**.

FRAUDULENT CONVEYANCES.

1. **THE JUDGMENT MUST BE PRODUCED** to entitle one, claiming as creditor, to impeach a conveyance as fraudulent; producing copies of the execution is not sufficient. *Sharp v. Wickliffe*, 37.
2. **POSSESSION UNDER UNRECORDED LOAN**.—To avoid the effect of continued possession under an unrecorded loan, the slaves must be returned to the owner so publicly and openly as to leave no doubt as to the change of possession. *Ewing v. Handley*, 140.
3. **A WIFE** is entitled to have vacated a conveyance made by her husband, and by which she is defrauded. *Guldry v. Griest*, 193.
4. **A LEGATEE** cannot avoid for fraud a contract which was binding on his testator. *Id.*
5. **A TRUST ATTENDING A SALE OF CHATTELS** is a fraud as to creditors. *Coburn v. Pickering*, 375.
6. **RETENTION OF POSSESSION BY VENDOR**, after an absolute sale of chattels, is *prima facie*, and if unexplained, conclusive evidence of a secret trust; nor is it explained by showing that the sale was at first without any trust, but that the goods were left with the vendor under a subsequent contract that he should retain possession, and pay rent for them. *Id.*
7. **WHETHER THERE WAS ANY TRUST** is a question of fact for the jury; but the trust being proved or admitted, the fraud is an inference of law which the court must pronounce. *Id.*
8. **DEED—PARTLY FRAUDULENT**.—If a deed is made to secure an honest debt, and also to cover up the property from creditors, it will not be allowed to stand as security for the amount due. *Miller v. Tollison*, 712.
9. **VOLUNTARY SETTLEMENT** made after marriage is void as against prior creditors; so if one, not then indebted, settles his property after marriage, and soon after contracts large debts, so as to manifest an object to cover up his property, the settlement will be held void. *Jenkins v. Clement*, 698.
10. **VOLUNTARY SETTLEMENT, WHO MAY HAVE RELIEF AGAINST**.—Where a trustee then little indebted made a post-nuptial settlement of his property on his wife, and subsequently became insolvent, and squandered the trust-estate, it was held that the beneficiaries of the trust were entitled to have the settlement vacated. *Id.*
11. **VOLUNTARY CONVEYANCES**, made when the donor is largely indebted, are void as against creditors, but are valid between the parties. *Chamberlayne v. Temple*, 786.

12. **VOLUNTARY CONVEYANCES—WHO MAY ATTACK.**—A voluntary conveyance will not be set aside in favor of a creditor unless he has established his demand at law by obtaining judgment, and, in the case of personal property, has sued out execution; or unless the donor has died, and it is shown, by a settlement of the administration account, that there are not sufficient assets in the hands of the administrator to pay the debts. *Id*

13. **CONTRIBUTION AMONG DONEES.**—When a decree is entered in favor of a creditor and against several voluntary donees, contribution among them should be decreed, so that each should pay no more than his just share; but all should be liable, as far as they have received funds from the donor, for the failure of any one to pay his proportion, until the debt is satisfied. *Id*.

GENERAL AVERAGE.

THE DOCTRINE OF GENERAL AVERAGE is not applicable to any accidental loss, but applies only when certain property is deliberately sacrificed to the attainment of some object. *Walker v. U. S. Ins. Co.*, 610.

GOOD-WILL.

See **NEWSPAPERS**, 2.

GROWING CROPS.

See **ACTIONS**.

GUARANTOR.

See **NEGOTIABLE INSTRUMENTS**, 16.

GUARDIAN AND WARD.

1. **GUARDIAN, CONVERSION BY.**—A ward may elect to consider an illegal sale made by his guardian as a conversion of the property sold, and may recover the price with interest. *Chesneau v. Girod*, 204.
2. **WHERE THE SAME PERSON IS ADMINISTRATOR AND GUARDIAN** of the heir, the balance, upon final settlement, shall be considered as in the hands of the guardian. *Seegar v. State*, 265.
3. **IDEM—EVIDENCE.**—Where the guardian of the heir intermarried with the administratrix of the decedent, and thereby came into the possession of the personality of the estate, in an action on the guardian's bond, after the rendition of the final account of the administration, it was held that the administratrix and her securities were, by such rendition, released and discharged, and, therefore, competent witnesses in the action. *Id*.

See **TRUSTS AND TRUSTEES**, 2.

HUSBAND AND WIFE.

1. **WIFE'S PROPERTY NOT LIABLE FOR HUSBAND'S DEBTS.**—Personal property conveyed to a trustee for the separate use of a married woman, during her life, is not liable to be taken in execution for her husband's debts. *Sharp v. Wickliffe*, 37.
2. **AN INTEREST IN CHATTELS VESTED IN A WIFE** before or during coverture belongs to the husband, if he survives, and passes to his administrator,

notwithstanding a particular estate therein undetermined which prevents his acquiring possession in her life-time. *Ewing v. Handley*, 140.

2. DEVISE IN TRUST TO WIFE.—A husband cannot sell lands devised to his wife in trust so as to vest the legal title in her. *May v. France*, 159.
4. A CONVEYANCE BY A HUSBAND passes the entire interest of his wife, entitled to a life-estate, if he survives her; but if she survives him, it passes her estate during his life only. *Evans v. Kingsberry*, 779.

IMPROVEMENTS.

1. IMPROVEMENTS MADE UNDER A PAROL CONTRACT to lease, may be compensated for in damages. *Findley v. Wilson*, 72.
2. BY PURCHASER UNDER PAROL CONTRACT.—A purchaser of land under a parol contract, which is not enforceable, cannot recover on an implied assumpsit for improvements made on the land. *Shreves v. Grimes*, 117.
3. BY BONA FIDE OCCUPANT.—A *bona fide* occupant is entitled to charge for improvements exceeding the rent. *Ewing v. Handley*, 140.
4. IMPROVEMENTS BY A VENDEE IN POSSESSION, who has paid the purchase-money, should be allowed for, although they exceed the rents and profits, if the vendor disaffirms the contract and refuses to refund the purchase-money without suit; but the vendee should not be allowed for improvements made after obtaining judgment for the price paid; and rents should commence at that time. *Id.*
5. BY OCCUPANT GENERALLY.—The general equity rule is that an occupant of land is regarded as the employee of the real owner, and not as his tenant, in clearing and fencing, and rendering it fit for cultivation; but after it is fit for cultivation, the accounts between the owner and occupant should be adjusted on the principles governing landlord and tenant; but many exceptions should be made. *Id.*

See STATUTE OF FRAUDS, 4; TRUSTS AND TRUSTEES, 2.

INDICTMENT.

See CRIMINAL LAW.

INFANCY.

1. INFANTS COMPELLED TO ELECT.—If an agreement be made by adults on one side and infants on the other, the latter, on coming of age, will be compelled to make an election either to confirm the agreement as a whole, or to relinquish all rights and pretensions resulting from it. *Overbault v. Heermance*, 546.
2. INFANT'S RIGHT OF ELECTION TO TAKE LAND OR MONEY.—If land is devised to be sold, and the proceeds paid to an infant, the infant has the right to take either the land or money; and if the guardian sells the land, and the sale is not advantageous to the infant, a court of equity may elect for him, and bind him by the election. *Tubner v. Street*, 792.

See ENTRY, 3; PARENT AND CHILD.

INJUNCTIONS.

1. INJUNCTIONS issue to protect those rights only which are clear, or at least free from reasonable doubt. *Snowden v. Noah*, 547.

2. **ALIENATION OF PROPERTY** by a defendant will not be enjoined at the instance of a creditor who has obtained a verdict but has not recovered judgment, although the defendant is seeking to elude the judgment. *Moran v. Dawes*, 550.

INNKEEPERS.

1. **COMMON INNKEEPERS ARE LIABLE** for all losses in their inns, happening either by the acts or negligence of themselves or their servants, to travelers and guests received by them. *Towson v. Havre de Grace Bank*, 254.
2. **IDEM, FOR THEFT.**—And if a servant is robbed of his master's money or goods, while a guest at an inn, the master may maintain the action against the innkeeper. *Id.*
3. **AN INNKEEPER IS ONLY ANSWERABLE** for money or other property lost at his inn, where the party losing it was a guest at the time of the loss. *Id.*
4. **THE REASON OF AN INNKEEPER'S LIABILITY** in the case of money, from the keeping of which no profit arises, is the profit arising either from the keeping of the horses, etc., or their guests, or from their entertainment. *Id.*
5. **TO RECOVER FOR THE LOSS OF MONEY** or other dead property, it is essential that the plaintiff should allege that he was a guest at the time of the loss. *Id.*

INQUEST OF OFFICE.

See **ALIENS**, 1, 2.

INSURANCE, FIRE.

See **MORTGAGES**, 11.

INSURANCE, MARINE.

1. **INSURED PROPERTY, RIGHT TO ABANDON.**—The assured may abandon the insured property, if it has been damaged to half its value. *Hyde v. Louisiana State Ins. Co.*, 196.
2. **IF THE DAMAGE IS LESS THAN ONE HALF** the value of the property, the assured has no right to abandon without first calling on the insurer to make necessary repairs. *Id.*
3. **IF THE INJURY** which the vessel has sustained be such that the unsound and decayed parts of the vessel cannot be used as before the accident, without repairs equal to half the value, the insured may abandon. *Id.*
4. **BUT IF REPAIRING THE INJURY**, which has arisen from one of the perils insured against, will replace her in the same situation she was before, no matter how unsound, the insured cannot abandon. *Id.*
5. **USAGES OF TRADE ARE ADMISSIBLE** in evidence to explain the meaning of expressions contained in policies of insurance, charter-parties, or instruments of like nature, whether such usages regard the course of the voyage or not. *Allegre v. Maryland Ins. Co.*, 289.
6. **PROOF OF LOSS.**—Where a policy of insurance stipulated for the payment of loss, in ninety days after proof and adjustment thereof, to support an action for loss, such proof must first be exhibited to the underwriters, and should be made by the protest, bill of lading and invoice, or such other equivalent proof as the nature of the loss admits of. *Id.*

7. TO ADJUST THE MEASURE OF THE INDEMNITY in case of a partial loss, where the cargo is a mixed one, proof of the actual value at the port of purchase must be produced. *Id.*
8. REFUSING TO PAY A LOSS without stating that the reason therefor is the want of the preliminary proof called for by the policy, will amount to a waiver of such proof. *Id.*
9. THE ASSURED'S RIGHT OF ACTION ACCRUES immediately upon the refusal to pay the loss, notwithstanding the policy states that payment is not to be made until ninety days after proof and adjustment of loss, and that, in case of dispute, the same should be settled by arbitrators. *Id.*

INTOXICATION.

See CONTRACTS, 3.

JUDGMENTS.

1. JUDGMENT OF NONSUIT OR DISMISSAL will not support a plea of *res judicata*. *Boudin v. Rokyf*, 182.
2. EVIDENCE.—Where a judgment is part of the muniments of an estate, it may be given in evidence without the proceedings on which it is founded. *Id.*
3. RES JUDICATA.—Strangers to a judgment can not avoid its effect by showing that it was erroneous, nor by relitigating the issues which have been decided. *Id.*
4. IDEM.—A judgment against a plaintiff in an action on an account stated, is no bar to a subsequent action of assumpsit on a promissory note, although the plaintiff sought to put the note in evidence in the former action, where it was excluded by the court. *Lindell v. Liggett*, 298.
5. OF SISTER STATE.—No action can be sustained here on a judgment obtained in another state against a non-resident, by attachment without personal service of process on the defendant. *Chamberlain v. Faris*, 304.
6. HOW PAYABLE.—A judgment can not be paid in bank notes, although the bank issuing the notes is the holder of the judgment. *Coxe v. State Bank*, 417.
7. SETTING OFF.—The judgment of a justice may be set off against a judgment of a court of record, if the time for appeal has expired. *Id.*
8. FORM OF.—A judgment entered in figures or for "legal costs" without specifying the amount, is erroneous, and will be reversed. *Smith v. Miller*, 418.
9. JUDGMENT BY CONFESSION, entered without the statement and specification required by statute, is fraudulent as against *bona fide* purchasers and judgment-creditors, though they have notice of it. *James v. Morey*, 475.
10. A JUDGMENT IS NOT OPEN to re-examination in equity on the ground that it is wrongful or unjust, if the complainant made, or might have made, his defense at law. *Donovan v. Finn*, 531.
11. EQUITY, AID IN ENFORCING JUDGMENTS.—In ordinary cases which are free from fraud or other ground specially cognizable in equity, the execution of a judgment and the methods of obtaining satisfaction are confined to courts of law. *Id.*
12. SATISFACTION BY LEVY.—When the plaintiff has seized goods sufficient to satisfy his judgment, it is thereby discharged. The goods cannot be

released and the judgment revived to the prejudice of subsequent judgment-creditors. *Hunt v. Breeding*, 665.

See EQUITY, 3; EXECUTORS AND ADMINISTRATORS, 5, 7, 10; ORPHANS' COURT; REDEMPTION; STATUTE OF LIMITATIONS, 5.

JUDICIAL SALES.

See EXECUTIONS.

JURISDICTION.

1. **SPECIFIC PERFORMANCE.**—A contract was made in Cuba by a citizen of New York with a Spanish subject, for the purchase of lands in Alabama. After partial payments had been made, and partial conveyances executed, the vendor sent a conveyance for part of the lands to his agent in New York, to be delivered on payment of a certain sum claimed, which was more than the vendee conceded to be due: *Held*, that the courts of New York had jurisdiction of a bill filed by the vendee for an account of payments and lands to be conveyed, and to restrain defendants from withdrawing the deed out of the jurisdiction of the court. *Ward v. Arredondo*, 543.

2. **JURISDICTION IN EQUITY MAY BE UPHELD** whenever the parties, or the subject, or such a portion of the subject, are within the jurisdiction, that an effectual decree can be made and enforced, so as to do justice between the parties. *Id.*

See ESTOPPEL, 6; FRAUD, 3.

LANDLORD AND TENANT.

A **TENANT CLAIMING TO HOLD ADVERSELY** to his landlord, after the expiration of his term, is liable to a proceeding for forcible entry and detainer, such claim being evidence of a refusal to surrender possession. *Hoskins v. Helm*, 133.

See ESTOPPEL, 1.

LEGATEES.

See FRAUDULENT CONVEYANCES, 4.

LIENS.

1. **VENDOR'S LIEN ASSIGNABLE.**—An assignee of notes for the purchase-money of land sold by the assignor, or of a judgment and execution therefor, takes under the assignment the vendor's lien upon the land. *Johnston v. Gwathmey*, 135.

2. **THE ASSIGNEE DOES NOT WAIVE HIS LIEN** by the mere fact that he may also have a lien upon land sold to the assignor. *Id.*

3. **EVIDENCE THAT NOTES ARE FOR PURCHASE-MONEY.**—The fact that notes thus assigned are identical in times of payment with installments of purchase-money recited in the deed to be still due, is sufficient, *prima facie*, to show that they were part of the consideration of such deed. *Id.*

4. **IMPLIED NOTICE OF LIEN.**—A subsequent purchaser of land subject to a vendor's lien is bound by implied, as well as actual, notice thereof; and he is chargeable with notice of such lien, if the conveyance to him refers

to the deed to his vendor, which, though unrecorded, recites a part of the consideration as "secured to be paid" at a future time, these words not necessarily or properly importing personal security. *Id.*

See ATTORNEY AND CLIENT.

LIS PENDENS.

1. **LIS PENDENS** is generally constructive notice to the whole world. At common law it commenced on the day that the writ bore *teste*, while in chancery it did not exist until the subpoena was served. *Newman v. Chapman*, 768.
2. **IN SUIT ON UNRECORDED MORTGAGE**.—If a mortgage is not recorded, a subsequent purchaser, without actual notice, is not bound by the pendency of a foreclosure suit. In such a case the rules of *lis pendens* are inapplicable. *Id.*

MALICIOUS PROSECUTION.

1. **IF THE DEFENDANT WAS GUILTY**, he cannot sustain any action, though the motive of the prosecutor was malicious; nor is the prosecutor liable if he prosecute from apparent guilt arising from circumstances which he honestly believes. *Plummer v. Gheen*, 572.
2. **PROBABLE CAUSE**.—What constitutes probable cause is a question both of law and of fact. If the defendant had, in the opinion of the jury, a probable ground for suspicion, this amounts in law to probable cause. *Id.*

MAINTENANCE, CHAMPERTY AND BARRATRY.

1. **CHAMPERTY AND MAINTENANCE** being offenses both at common law and by statute, contracts of that character made by counsel will not be enforced in equity, either in his behalf or in that of his assignee; so, even though they were not void at law. *Rust v. Larue*, 172.
2. **CHAMPERTY BEFORE SUIT COMMENCED**.—It is not necessary to render a contract champertous that there should be a suit commenced at the time. *Id.*
3. **COMPENSATION NOT FORFEITED BY CHAMPERTY**.—A counsel does not forfeit his right to full compensation for services by entering into a champertous contract; and where, from his client's insolvency, a suit at law would be fruitless, equity will take jurisdiction, and decree compensation out of the property recovered. *Id.*

MANURE.

See FIXTURES, 6.

MARRIAGE

A MARRIAGE PROCURED BY FRAUD, error and abduction, will be vacated in equity at the suit of the innocent party. *Perlat v. Gojon*, 554.

See DIVORCE; PARENT AND CHILD, 1.

MASTER AND SERVANT.

SERVANT OF BANK, WHO IS.—One who receives notes of a bank with the request to pass them off for its benefit, is, *quo ad hoc*, a servant of the bank. *Towson v. Havre de Grace Bank*, 254.

MERGER.

1. **OF MORTGAGE.**—Whether the mortgage, on becoming vested in the same person with the equity of redemption, will merge or will continue as a charge, depends upon the intention, actual or presumed, of the person in whom the interests are united; and this person will be presumed to intend that which is most to his advantage. *Freeman v. Paul*, 237.
2. **WHEN A GREATER AND A LESS ESTATE** meet in the same person, without any intermediate estate, the less at once merges into the greater. This rule at law is inflexible. *James v. Morey*, 475.
3. **IN EQUITY.**—The doctrine of the merger of estates is not favored in equity; and where two or more rights or estates are united in one person, equity will keep them distinct, if from the intention of the party, express or implied, he wishes them so kept. *Id.*
4. **ELECTION TO TREAT AN ESTATE AS MERGED.**—If a person holding both the mortgage and the equity of redemption makes a conveyance in fee, this is an election to treat the mortgage as merged. *Id.*
5. **PRESUMED INTENTION.**—Although there is no evidence of the intention of a party, or though he is a lunatic, and incapable of forming an intent, the court will presume him to intend that there shall be no merger, if a merger is contrary to his interests. *Id.*
6. **WHEN PARTY MAY ELECT.**—When the legal and equitable estates unite in one person, he has a reasonable time to elect whether he will treat them as separate or merged. *Id.*

MORTGAGES.

1. **A MORTGAGE** is a mere security for the debt. *Wilson v. Troup*, 458.
2. **ASSIGNMENT OF MORTGAGE.**—An assignment or conveyance of the mortgagee's interest in the land, is a nullity, unless accompanied by an assignment of the debt. *Id.*
3. **MORTGAGEE'S RIGHT TO FORECLOSE** is not affected by his having made conveyances of parts of the mortgaged premises, except in so far as it precludes him from defeating his own grants or acting in hostility thereto. *Id.*
4. **MORTGAGEE'S RIGHT TO REDEM** is not prejudiced by any conveyance of the whole or of parts of the mortgaged premises, made by the mortgagee. *Id.*
5. **CONVEYANCE BY A MORTGAGEE.**—If a mortgagee convey any part of the mortgaged premises, and thereafter, on foreclosure, acquire the title thereto, his acquisition operates for the benefit of his prior grantee. *Id.*
6. **ASSIGNEE OF MORTGAGE**, if the assignment is made without the privity of the mortgagor, holds subject to the right of the latter to an account with the mortgagee, but not subject to equities existing against the mortgagee in favor of third persons. *James v. Morey*, 475.
7. **NOTICE OF ASSIGNMENT** of mortgage should be given to the mortgagor, or payments made by him to the mortgagee must be allowed, but no notice need be given to subsequent assignees. *Id.*
8. **MORTGAGE, WHAT SECURED BY.**—A mortgage does not stand as security for a general balance due the mortgagee, nor for other claims not embraced in the mortgage. *Id.*

9. MORTGAGES FOR FUTURE ADVANCES are valid. *Id.*
 10. A MORTGAGEE is not entitled to protection as a purchaser. *Id.*
 11. INSURANCE AGAINST FIRE is not a charge on the mortgaged premises, unless made so by agreement. *Fawc v. Wisnau*, 545.
 12. TAXES PAID ON THE MORTGAGED PREMISES are a legal charge against the mortgaged estate, even in the absence of an agreement. *Id.*
 13. PARTIES TO FORECLOSURE.—The assignee of a mortgage may foreclose it without making his assignor a party. *Newman v. Chapman*, 766.
- See ADVERSE POSSESSION, 5; CORPORATIONS, 2; LIS PENDENS, 2; MERGER, 1; POWERS, 5; RECORDING, 2.

NE EXEAT.

1. THE WRIT OF NE EXEAT is not a prerogative writ in this state; but is an ordinary process of courts of equity to which suitors, in proper cases, are entitled as a matter of right. *Gilbert v. Colt*, 557.
2. THE WRIT OF NE EXEAT may issue against a foreigner or a citizen of another state, while in this state. *Id.*
3. IN AWARDING A WRIT OF NE EXEAT, the court may consider the defendant's answer, as well as the affidavit filed by plaintiff; and may issue the writ, if the answer shows a sufficient cause, though the affidavit does not. *Id.*
4. THE AMOUNT OF THE BAIL on a writ of *ne exeat* is fixed by the court. *Id.*

NEGLIGENCE.

See EXECUTORS AND ADMINISTRATORS, 3.

NEGOTIABLE INSTRUMENTS.

1. NOTICE TO INDORSER may be excused if his residence is unknown and he cannot, after due diligence, be found. *McLanahan v. Brandon*, 188.
2. MEMORANDUM ON A NOTE.—A memorandum at the bottom of a note, or an addition to the acceptance of a bill, stating a particular place of payment, made with the assent of the holder, is a part of the contract. *Tuckerman v. Hartwell*, 225.
3. IF THE NAME OF A PLACE is written at the bottom of a note or bill, it is for the jury to decide when, by whom, and for what purpose it was placed there. *Id.*
4. RIGHTS OF INDORSEES.—Indorsees *bona fide* for value of negotiable securities, not overdue, are not affected by contracts and equities of which they had no notice. *Merrill v. Merrill*, 247.
5. ASSIGNEE'S RIGHTS.—The assignee of a non-negotiable chose in action holds it subject to all the equities which existed against it in the hands of the obligee. *Id.*
6. WAIVER OF OFFSET.—Where the assignor of a note demanded payment and was referred to a co-promisor, and was not, until several years afterwards, informed of any claim of offset; it was held that the right to offset had been waived. *Id.*
7. A PROMISSORY NOTE is not an extinguishment of a pre-existing debt. Upon non-payment the creditors may sue on the original contract. *Pe-tapeco Ins. Co. v. Smith*, 268.

8. **THE NOTE OF A THIRD PERSON**, given by the vendee to the vendor, does not extinguish the original contract, unless it was received as payment of the debt. *Id.*
9. **THE MAKER IS A COMPETENT WITNESS** on behalf of the plaintiff in an action by the indorsee against the indorser of a promissory note, judgment having been recovered against the maker on such note. *Bank of Columbia v. Magruder*, 271.
10. **CUSTOM AFFECTING DEMAND AND NOTICE**.—Where demand and notice were not made until the day after the third day of grace, in conformity to the established practice of the bank, the holder, such demand and notice were held sufficient to charge an indorser who had knowledge of the practice. *Id.*
11. **DEFECT IN A DECLARATION** in an action on a promissory note, in alleging demand and notice, must be taken advantage of on demurrer, or by way of exceptions to the admissibility of evidence at the trial. *Id.*
12. **MAILING NOTICE OF NON-PAYMENT** of a promissory note, by addressing the same to the post-office nearest to the residence of the party entitled to notice, will be sufficient. *Id.*
13. **IDEM.**—Where the notary has made inquiries concerning the residence of the maker, and the post-office where he receives his letters, and sends the notice to such office, the court will presume that to be the post-office nearest to the indorser, in the absence of proof to the contrary. *Id.*
14. **NOTE PAYABLE AT PARTICULAR TIME AND PLACE**.—In an action on a note, payable at a particular time and place, demand at such time and place need not be shown. *Eastman v. Fifield*, 371.
15. **NEGOTIABLE INSTRUMENT, WHAT IS.**—A request in writing by A. directed to C., requesting him to credit B. or bearer thirty dollars, and promising to pay that sum if the credit should be given, is not a negotiable note, nor a bill of exchange. *Woolley v. Sergeant*, 419.
16. **THE GUARANTOR OF A NON-NEGOTIABLE instrument** is liable without demand or notice. *Id.*
17. **NOTICE TO INDORSER** may be given by sending it to the post-office where he is most likely to receive it at the earliest moment, instead of to the post-office nearest his residence. *Bank of U. S. v. Lane*, 595.
18. **INDORSER—WHEN NOT AFFECTED BY FRAUD.**—If the negotiable note of a corporation is fraudulently given by one having authority to give it, and afterwards comes fairly, in the usual course of business, and without notice of the fraud, into the hands of a third person, the latter cannot be prejudiced by proof of the fraud. *Ridgway v. Farmers' Bank*, 631.
19. **INDORSEMENT, SECOND DELIVERY OF.**—If W., the payee of a note, indorses it to A., and subsequently purchases the note back, and delivers it with the blank indorsement to P., this is a good indorsement to P., and W. is bound by it. *Woodson v. Gordon*, 743.

See AGENCY, 1.

NEWSPAPERS.

1. **A NEWSPAPER ESTABLISHMENT** is the subject of property, and so far as the rights of such an establishment are private and exclusive, this species of property will be protected by law. *Snowden v. Noah*, 547.

2. **GOOD-WILL OF A NEWSPAPER** may be protected from deception and piracy, but not from the competition of a rival, though he uses a name somewhat similar to that of the journal first established. *Id.*

NEW TRIALS.

VERDICT AGAINST EVIDENCE.—A new trial ought not to be granted on the ground that the verdict is against evidence, where the evidence on both sides was merely circumstantial. *Sharp v. Wickliffe*, 37.

NOTARIES.

See **EVIDENCE**, 21.

NOTICE.

POSSESSION AS NOTICE OF TITLE.—One who purchases an estate knowing it to be in the possession of tenants, is bound to inquire what estates they hold. *James v. Morey*, 475.

See **LIENS**, 4; **LIS PENDENS**; **MORTGAGES**, 7; **NEGOTIABLE INSTRUMENTS**, 1, 12, 13, 16, 17; **RECORDING**.

NUISANCE.

GRANTOR'S LIABILITY FOR CONTINUANCE.—A grantor of land, who has erected a nuisance thereon, whereby an adjacent land-owner is damaged, is liable for the continuance of such nuisance, notwithstanding his conveyance. *Plummer v. Harper*, 333.

OFFICE AND OFFICERS.

1. **THE OFFICE OF DEPUTY SHERIFF AND JUSTICE OF THE PEACE** are incompatible, and the acceptance of the latter will vacate the former. *Wilson v. King*, 84.
2. **OFFICER DE FACTO.**—The acts of a deputy sheriff as such, after he has qualified as justice of the peace, are not on that account void. A replevin bond, taken after the qualification as justice, can not for that reason be set aside on the motion of the obligors. *Id.*

See **COURT COMMISSIONERS**; **EXECUTIONS**.

ORPHANS' COURT.

1. **THE ORPHANS' COURT** is a court of record, invested with chancery powers, conducted by chancery rules, and acting on and controlled by the principles of courts of equity. *McPherson v. Cawlift*, 643.
2. **ORPHANS' COURT PROCEEDINGS** for the sale of lands, are proceedings *in rem* against the estate of the intestate. *Id.*
3. **THE JURISDICTION OF THIS COURT** is dependent upon the death of the intestate. Letters testamentary or of administration on the estate of a living man are void. *Id.*
4. **ORPHANS' COURT SALES** can not be attacked collaterally for irregularities, mistakes or errors in the proceedings of the court. Purchasers need only inquire whether the sale was ordered by a court having jurisdiction to order it. Orphans' court sales are protected from collateral attack to the same extent as those made under execution. *Id.*

5. ORPHANS' COURT AMENDMENT.—The orphans' court may order its proceedings amended by adding to an administrator's account an affidavit which had before been taken in court but not filed. *Kennedy v. Wachsmuth*, 676.
6. ORPHANS' COURT ORDERS OR DECREES can not be controverted unless it had exceeded its jurisdiction. *Id.*

PARENT AND CHILD.

1. PROCURING CHILD'S MARRIAGE WITHOUT PARENT'S CONSENT.—No action lies by a parent for procuring the marriage of his infant child without his consent. *Jones v. Tevis*, 98.
2. ACTION FOR ENTICING AWAY INFANT.—A father, or if he be dead, the mother, may maintain an action for enticing away an infant, *per quod servitium amisit*; but such action must be trespass on the case, not trespass *vi et armis*. *Id.*

PARTNERSHIP.

1. A PARTNER'S ACTS AFTER DISSOLUTION of the partnership will bind the other partners unless notice of the dissolution be given. *Price v. Towsey*, 81.
2. VOLUNTARILY PAYING ANOTHER'S DEBT will not constitute one the creditor of that other; but such payment is a sufficient consideration to support a promise of repayment. *Id.*
3. PURCHASE OF LAND IN PARTNERSHIP.—Where two purchase land in equal partnership, although one pays more than half the money, he is not entitled to a conveyance of more than half the land. *Farmer v. Samuel*, 106.
4. A PARTNER PURCHASING PARTNERSHIP LAND UNDER EXECUTION against the partners, does not thereby extinguish his copartner's interest therein, but the purchase is no more than a bare payment. *Id.*

See SET-OFF, 3.

PATENTS.

LOCATING GRANT ADJOINING RIVER.—A grant of lands, extending along a river, and embracing the space of fifteen miles on each side thereof, must be located so that the sides will be parallel to the river, and so as to include all land which can be found within fifteen miles of the river, measuring from any point, in any direction, not above or below the points of limitation; and the ends must be at right angles with the general course of the river. *Winthrop v. Curtis*, 216.

See ALIENS, 3

PAYMENTS.

1. PAYMENT OF MONEY TO A THIRD PERSON must be proved by the examination of witnesses. The receipts of such persons made after the cause of action against the defendant accrued, are inadmissible. *Davis v. Shreve*, 66.
2. APPROPRIATION OF PAYMENTS.—The creditor has the right to appropriate the payment, if the debtor does not; but this right must be exercised within a reasonable time, and by the doing of some act indicative of the intention. Where neither party makes the appropriation, the law presumes:
 1. That the debtor intended to pay in the way most to his advantage;

and, 2. If the interest of the debtor would not be promoted by any particular appropriation, then, that the creditor received the money in the way most for his benefit, unless he was bound in conscience to make some other application of it. *Harker v. Conrad*, 691.

See EVIDENCE, 17.

PLEADING AND PRACTICE.

1. **REFERRING CONDITIONS OF DECREE TO CLERK.**—Where a final decree is to be enforced on certain conditions, the court should see that the conditions are complied with, and it is erroneous to leave that question to the determination of the clerk. *Farmer v. Samuel*, 106.
2. **ON RENDERING A DECREE FOR A CONVEYANCE**, upon a payment or tender of money, the proper way is for the court to assign a day on, or before, which such payment or tender shall be made, reserving to itself the right of determining whether the condition has been complied with, and if so, to render a positive decree for the land; and it is erroneous to decree that, upon the defendant's refusing a tender of bank notes, the complainant may enter into bond approved by the clerk for the payment of the amount in currency of the union, and that thereupon the clerk may issue a writ of *habere facias possessionem*. *Id.*
3. **DISMISSAL OF BILL NOT SET ASIDE, WHEN.**—A dismissal of a bill as to certain defendants, by the complainant, will not be set aside on the application of those defendants, where their interests are sufficiently protected without it. *Ewing v. Handley*, 140.
4. **THE DISCRETIONARY POWERS OF COURTS** of law are confined within fixed and well-established limits, and are to be exercised to further, not prevent, the administration of public justice. Principle applied to the order of a court directing the plaintiff to submit to a nonsuit, or to a verdict for the defendants. *Allegre v. Maryland Ins. Co.*, 289.
5. **INSTRUCTIONS, WHAT THE PARTIES ARE ENTITLED TO.**—A party, if there be any evidence tending to prove a fact, has a right to an instruction from the court on the law resulting therefrom. *Plummer v. Gheen*, 572.
6. **EXCEPTIONS.**—The counsel who takes an exception has the right to have it fixed immediately; but this may be done by a note in writing, without then drawing up the bill in full form. *Stewart v. Huntingdon Bank*, 628.
7. **PARTIES.**—When the court, on the application of creditors, opens a judgment for the purpose of trying whether the bond sued upon was given to defraud creditors, it is not necessary that the latter be made parties to the action. *Whiting v. Johnson*, 633.
8. **PARTIES PLAINTIFF.**—An action to recover damages for the breach of a covenant for the conveyance of land must be brought by the administrator, and not by the heir. *Watson v. Blaine*, 669.

See CORPORATIONS, 5, 6, 7; NEGOTIABLE INSTRUMENTS, 11.

PLEDGE.

See EXECUTOR AND ADMINISTRATOR, 14.

POWER OF ATTORNEY.

See AGENCY.

. POWERS.

1. **GENERAL POWER TO SELL AND CONVEY.**—Where town trustees are invested by a special statute with the title to land, and with a general authority to sell and convey, their deed *prima facie* implies a due execution of the power, notwithstanding the act of 1801; but where there is a naked power to convey under special restrictions, one claiming under such power must show a strict execution of it. *Morrison v. McMillan*, 115.
2. **EXECUTION OF POWER IN DEVISE.**—Where slaves were devised to a husband and wife for life with power to dispose of them as they pleased among their children during their lives or at death, it was held that a continued loan for more than five years to one of the children rendered the slaves liable for such child's debts the same as if the power had been formally executed by gift. *Ewing v. Handley*, 140.
3. **EXECUTION OF POWER BY ATTORNEY.**—A naked power cannot be delegated, but where a devise is to executors in trust to sell and convey, it seems that they may act by attorney. *May v. Frazee*, 159.
4. **POWER OF SALE** does not authorize the transfer of the property of the principal in payment of a debt. *Durham v. Oddie*, 190.
5. **POWER TO MORTGAGE** authorizes the execution of a mortgage with a power of sale, particularly where it is the custom of the country to include such powers in mortgages. *Wilson v. Troup*, 458.
6. **POWERS—HOW CONSTRUED.**—In considering the extent of a power, the intent of the parties must control. In conformity with this intent, a general power may be limited, or a limited power made general. *Id.*
7. **THE POWER OF A MORTGAGEE TO SELL** is a power coupled with an interest. *Id.*

PRESCRIPTION.

See ADVERSE POSSESSION, 3, 4; SPECIFIC PERFORMANCE, 2, 4; WATER RIGHTS, 2.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

QUO WARRANTO.

1. **OBJECT OF.**—The object of the writ of *quo warranto* was to remove or terminate some usurpation of the rights or prerogatives of the crown. *Commonwealth v. Murray*, 614.
2. **QUO WARRANTO AGAINST A MINISTER** cannot be sustained where there is no established church and each religious society manages its own concerns. He does not hold an office connected with the administration of justice, nor does he exercise a right or franchise belonging to the commonwealth. *Id.*

REDEMPTION.

1. **REDEMPTIONER BY JUDGMENT.**—A judgment upon full consideration entitles the judgment-creditor to the privileges of a redemptioner, though entered solely for the purpose of giving him the right to redeem. *Snyder v. Warren*, 519.

2. **COMPUTATION OF TIME FOR.**—The time for redemption is computed by allowing the full number of calendar months from the day of the sale. *Id.*

REAL ESTATE.

1. **A TITLE SUBSEQUENTLY ACQUIRED BY THE COMMONWEALTH** by escheat, from an elder patentee, will not inure to the benefit of a junior patentee. The commonwealth may convey this title to another, who will have all the rights of the elder patentee. *Elmendorff v. Carmichael*, 140.
2. **THE SOVEREIGNTY IS NOT SUBJECT TO IMPUTATIONS** of fraud, is not bound by the doctrine of estoppel, nor do her grants imply warranties. *Id.*
3. **VARIATION IN BOUNDARY LINES.**—If an established or admitted line of a grant varies from the calls of the grant, the other lines, if not marked, should be run with the same variation as the admitted line. *Sesier v. Wilson*, 741.

RECORDING.

1. **FAILURE TO RECORD A POWER OF ATTORNEY** does not affect its validity as against the person who executed it. *Wilson v. Troup*, 458.
2. **RECORDING OF AN ABSOLUTE DEED**, when intended as a mortgage, must be in the book of mortgages, or it will not impart notice. *James v. Morey*, 475.
3. **RECORDING AN INSTRUMENT** not entitled to be recorded does not give notice. *Id.*
4. **UNRECORDED INSTRUMENTS** are valid against all persons having actual notice thereof; and this notice may be inferred from circumstances. *Newman v. Chapman*, 768.
5. **INSTRUMENTS NOT ACKNOWLEDGED OR ATTESTED** so as to entitle them to record, are nevertheless valid between the parties. *Id.*

See EVIDENCE, 1; LIS PENDENS, 2.

RELEASE.

1. **A RELEASE BY ONE OF SEVERAL PLAINTIFFS**, in an action on the case in the nature of waste, is a good bar. *Kimball v. Wilson*, 342.
2. **PLEADING RELEASE AFTER ACTION COMMENCED.**—A general release after the commencement of the action need not be pleaded *pais darrein continuance*, where no prior plea has been filed; nor need it be pleaded in bar of the further maintenance of the action merely; but a plea of such release in bar generally is good. *Id.*
3. **COSTS ARE PRESUMED TO HAVE BEEN ADJUSTED** by the parties where a general release by one of the plaintiffs is given pending the action; and as the plaintiffs are entitled to have the release pleaded, neither party can claim costs where the plea is adjudged sufficient. *Id.*

REPLEVIN.

1. **BY PART OF THE DEFENDANTS.**—It is not clear that a part of the defendants in an execution can replevy; but if a part do replevy, they will not be permitted to vacate the bond, on the ground that the other defendants are not obligors in it. *Wilson v. King*, 84.
2. **REPLEVIN FOR GOODS TAKEN ON MESNE PROCESS**, does not lie. *Smith v. Huntington*, 331.

RES JUDICATA.

See JUDGMENTS, 3, 4.

SALES.

1. **DELIVERY OF POSSESSION.**—A sale of slaves of which the vendor thereafter continued in possession, is fraudulent and void as against a subsequent purchaser for value, in good faith and without notice. *Rocheblave v. Potter*, 305.
2. **THE PROPERTY IN GOODS SOLD DOES NOT VEST** in the purchaser where anything remains to be done by the seller before delivery. Accordingly, where one purchased and paid for a quantity of hay, to be weighed out of a mow when he should see fit to move it, it was held that the property did not vest in him before the weighing, so as to enable him to maintain trover. *Davis v. Hall*, 373.

See POWERS, 1, 4.

SEDUCTION.

EVIDENCE THAT THE CHARACTER OF THE WOMAN SEDUCED, for chastity, was bad, is admissible on behalf of defendant in an action for debauching plaintiff's daughter. *Carder v. Forehand*, 317.

SET-OFF.

1. **SET-OFF IN EQUITY** is governed by the same rules as at law. *McDonald v. Neilson*, 431.
2. **NOTICE OF SET-OFF** need not be as precise and formal as a declaration, but it must describe with reasonable certainty the demand sought to be set off. *Lewis v. Culbertson*, 607.
3. **SET-OFF IN FAVOR OF SURVIVING PARTNER.**—In an action against a surviving partner upon a partnership debt, he may set off a debt due him individually from plaintiff. *Id.*
4. **ONE OF SEVERAL DEFENDANTS** is entitled to set off a debt due him individually from the plaintiff. *Stewart v. Coulter*, 680.

See JUDGMENTS, 7; NEGOTIABLE INSTRUMENTS, 6.

SHELLEY'S CASE.

1. **THE RULE IN SHELLEY'S CASE** is equally applicable to limitations in wills as in deeds. *Lyle v. Digges*, 284.
2. **THE WORD "ISSUE"** in a will is sometimes a word of limitation and sometimes of purchase, depending on the context. *Id.*

SHERIFFS.

LACER.—The duty of sheriffs is to execute all process with the utmost expedition, or as soon as the nature of the case will admit; and they are liable for all damage occasioned by their failure to proceed with proper alacrity. *Lindsay v. Armfield*, 603.

See AMENDMENTS, 1; ATTACHMENT, 3; BONDS, 1, 2; EXECUTIONS; OFFICE AND OFFICERS.

SOLE TRADERS.

See FEMES-COVERT.

SOVEREIGN RIGHTS.

See REAL ESTATE, 2.

SPECIFIC PERFORMANCE.

1. A VENDOR SEEKING SPECIFIC PERFORMANCE, must show himself able as well as willing to give a clear title to the land. *Leach v. Herndon*, 68.
2. *IDEM*.—Showing an uninterrupted possession of twenty years in himself and those under whom he claims is not sufficient. *Id.*
3. DOUBTFUL TITLE.—If it is claimed and appears probable that a deed, through which complainant's title is deraigned is a forgery, and it is doubtful whether he has been in possession sufficiently long to obtain title through the operation of the statute of limitations, the case is a proper one for an issue at law to determine whether the title is good. *Seymour v. DeLancey*, 552.
4. TITLE BY PRESCRIPTION.—If the vendor has been in adverse possession for the time specified in the statute of limitations, his title is not so impeached as to prevent his maintaining a suit for specific performance, by slight proof that the former owner was an alien, nor by the mere contingency that such owner may have died leaving heirs disabled from asserting their rights. *Id.*
5. IF A PURCHASER CAN GET THE SUBSTANTIAL INDUCEMENT to his contract, he may insist upon taking and be made to accept a title to so much as can be given, compensation being made for the deficiency. *Evans v. Kingsberry*, 779.

STATUTES.

1. FACTS STATED IN A PRIVATE STATUTE are strong evidence against those who procured its passage. *May v. Frases*, 159.
2. REPEAL OF STATUTE BY IMPLICATION.—An act of the legislature of Maine, relating to the same subject as a statute of Massachusetts, continued in force by the act of separation, but expressing different sentiments, establishing different principles, and containing provisions better suited to the people of Maine, is a virtual repeal of the act of Massachusetts. *Towle v. Marrett*, 208.

See CONSTITUTIONAL LAW, 1, 5, 6; EVIDENCE, 5.

STATUTE OF FRAUDS.

1. ESTOPPEL.—The statute of frauds will not protect one who is equitably bound to convey land, although by a contract on which no action could be maintained against him by his vendee, and who has represented the title of his vendee to be good, thereby inducing others to purchase from him. *Springle v. Morrison*, 41.
2. A PAROL SUBMISSION to ARBITRATION concerning the title to land is within the statute of frauds. *Stark v. Cannady*, 76.
3. THE STATUTE OF FRAUDS DOES NOT FORBID the enforcement of trusts and equities resulting from a transaction by implication of law. *Id.*

4. UNDER A PAROL CONTRACT OF EXCHANGE of lands, where the contracting parties have occupied the tracts exchanged, neither can recover rents of the other. But on declaring such exchange void, the value of the lasting improvements at the time of the decree should be taken into consideration by the court. *Id.*

STATUTE OF LIMITATIONS.

1. CONTRACTS MADE BY EXECUTORS or administrators, although in fulfillment of executory contracts made by the decedent, are not within the act of 1819, limiting the time of bringing suits against executors or administrators. *Cummins v. Kennedy*, 45.
2. TIME DOES NOT RUN against a *cestui que trust* either at law or in equity. *Thomas v. White*, 56.
3. TIME BEGINS TO RUN when the right of action accrues, not when a person, ignorant of his rights, comes to a knowledge of them. *Id.*
4. THE EXCEPTION IN CHANCERY is where the rights are purely equitable. *Id.*
5. WHEN JUDGMENT DOES NOT SUSPEND.—An unexecuted judgment in ejectment, without surrender of possession, does not stop the running of the statute of limitations. It merely gives a right of entry during the continuance of the demise laid in the declaration, but not afterwards. *Smith v. Hornback*, 122.
6. WHEN TIME COMMENCES TO RUN.—In an action by an executor on the bond of a legatee, conditioned for the repayment of the legacy in case a deficiency of assets should arise, it was held that the statute of limitation commenced to run from the discovery of the deficiency of the assets, and not from the date of the bond. *Salisbury v. Black*, 279.
7. NO PERSON TO BRING SUIT.—When there is no person competent to bring an action to recover property, its adverse possession can not vest title in the wrongful possessor. *McDonald v. Walton*, 318.
8. EFFECT ON CESTUI QUE TRUST.—When the trustee is barred by the statute of limitations from maintaining ejectment, the *cestui que trust* is barred likewise. *Ferguson v. Kennedy*, 761.
9. OF ANOTHER STATE.—In an action brought in Virginia on a judgment recovered in North Carolina, the statute of limitations of the last-named state does not control. The law where the remedy is sought prevails. *Jones v. Hook*, 783.

See ADVERSE POSSESSION.

SURETYSHIP.

- SURETY'S RIGHT TO SECURITY GIVEN CO-SURETY.—If there are several sureties for one debt, and the principal conveys property in trust to one of them to indemnify him, the others are also entitled to the benefit of the property to indemnify them. *McMahon v. Fawcett*, 796.

TENANCY IN COMMON.

1. REMEDY AGAINST CO-TENANT FOR NEGLIGENCE.—Where a mill, owned in common, was burned, through the negligence of one of the tenants in common, it was held that his co-tenants might maintain a joint action on the case against him therefor. *Chesley v. Thompson*, 324.

2. CO-TENANCY, TAKING OF PROFITS.—If one co-tenant receive the whole profits, the other cannot maintain an action of assumpsit for use and occupation, or money had and received. *Chambers v. Chambers*, 585.

See COVENANTS, 7.

THEFT.

See CRIMINAL LAW, 2; INNKEEPERS, 2.

TIME.

How COMPUTED.—If, in a statute, time is to be computed from the doing of an act, the day on which it is done is excluded from the computation. *Ex parte Dean*, 521.

See REDEMPTION; STATUTE OF LIMITATIONS.

TRUSTS AND TRUSTEES.

1. TRUSTEE'S POWER UNDER WILL.—A devise to an infant, with directions that another occupy the land during the infant's nonage, for the support of the family, but not to use the land in any other way, will not entitle the trustee or the infant's guardian to charge the land with improvements made thereon. *Findley v. Wilson*, 72.
2. A TRUSTEE WHO CAUSES IMPROVEMENTS to be made on the land of his ward by holding out the expectation of a lease, where no such lease can legally be made, is liable personally. *Id.*
3. TRUSTEE, A PURCHASE BY can be questioned only by the *cestui que trust*. *Wilson v. Troup*, 458.

See FRAUDULENT CONVEYANCES, 5, 6, 7.

USAGES.

See INSURANCE, 5.

VENDOR AND VENDEE.

A VENDOR AND VENDEE HAVE MUTUAL LIENS, the former for the purchase-money still due, and the latter for that which has been paid, in case it is to be restored. *Farmer v. Samuel*, 106.

See EVIDENCE, 2, 8, 9, 19; FRAUDULENT CONVEYANCES; IMPROVEMENTS, 4; LIEN, 1; SPECIFIC PERFORMANCE, 1.

VERDICT.

MISTAKE IN VERDICT, RELIEF IN EQUITY.—Equity will relieve against a mistake in a verdict by which the jury omitted to give interest. *Cohen v. Dubose*, 709.

See NEW TRIALS.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES.

WARRANTY.

See COVENANTS, 1, 2, 3, 6, 7, 11.

WATER RIGHTS.

1. **WATER, RIGHTS IN.**—Property in water, and in the use and enjoyment of it, is as sacred as the right to the soil over which it flows. *Campbell v. Smith*, 400.
2. **PRESCRIPTION AGAINST WATER RIGHTS.**—After the lapse of twenty years, during which adverse possession of a water right has been continuously maintained, a grant will be presumed in favor of the adverse holder; but possession for the full period is indispensably necessary to defeat the right of the proprietor of the ancient channel. *Id.*
3. **PRESUMPTION OF A GRANT OF THE RIGHT TO WATER** does not arise from the mere submission of the owner to an adverse enjoyment thereof, for a period less than twenty years. *Id.*

See AFFURTENANCES.

WILLS.

1. **UNDER A DEVISE TO "CHILDREN,"** grandchildren may take if there are no children. *Ewing v. Handley*, 140.
2. **WILL, WORDS TO PASS REAL ESTATE.**—A will of "all I possess, indoors and outdoors," is sufficient to pass real estate. *Tolar v. Tolar*, 575.
3. **DEVISE IN FEE.**—Words of inheritance or of perpetuity are not essential in a devise to pass the fee. *Jenkins v. Clement*, 698.
4. **ALTERATION IN WILL.**—If a testator directs one of the witnesses to his will to make certain alterations therein, which are accordingly made, and assented to by the testator, but not witnessed, the alterations will control regarding personal property, but cannot affect real estate. As respects real estate, the will stands as it stood before alteration. *Greer v. McCracken*, 755.
5. **REVOCATION OF WILLS.**—An ineffectual attempt to alter a will does not operate as a revocation. *Id.*

See EVIDENCE, 4.

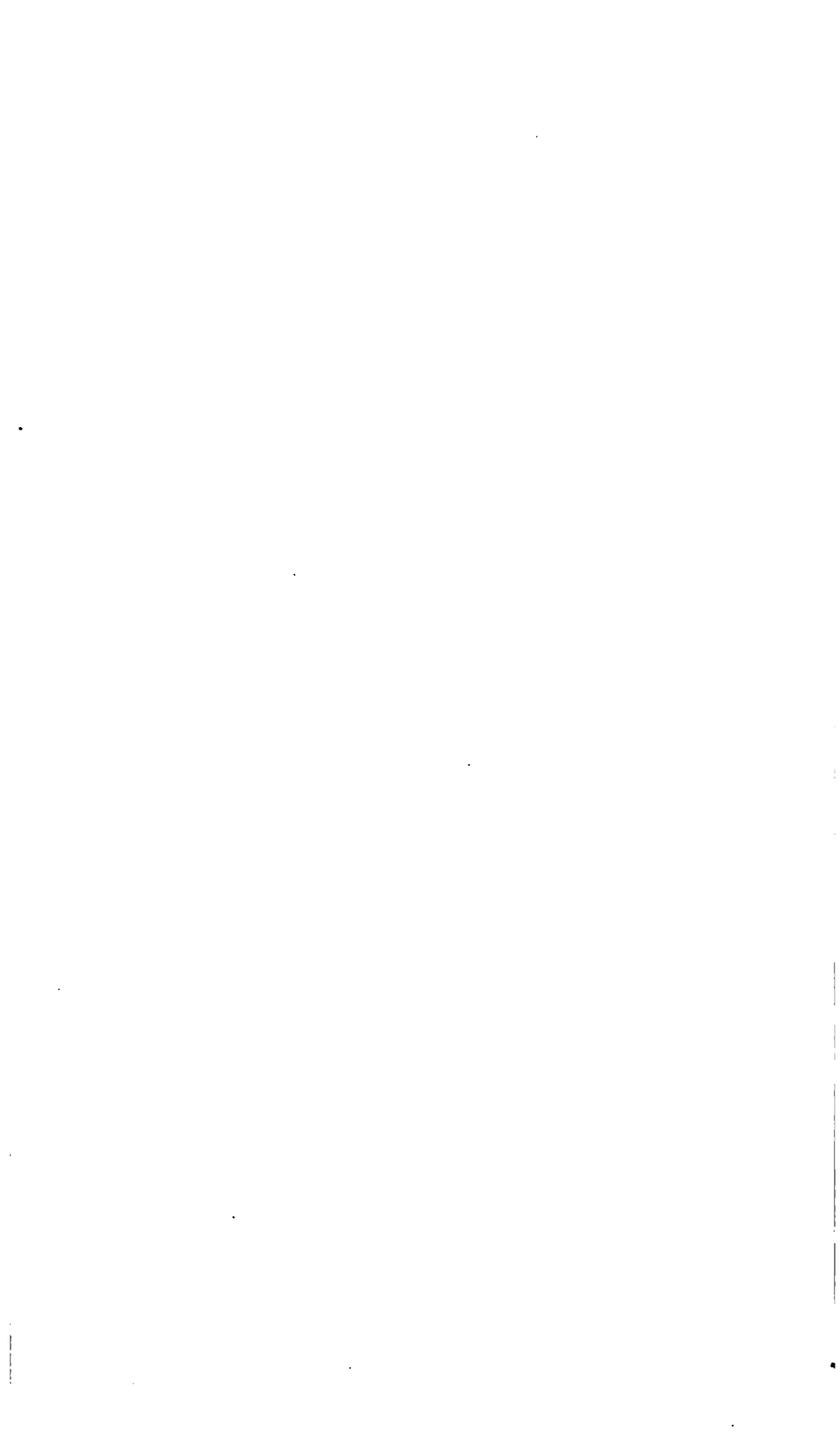
WITNESSES.

See EVIDENCE, 6, 12.

WRITTEN INSTRUMENTS.

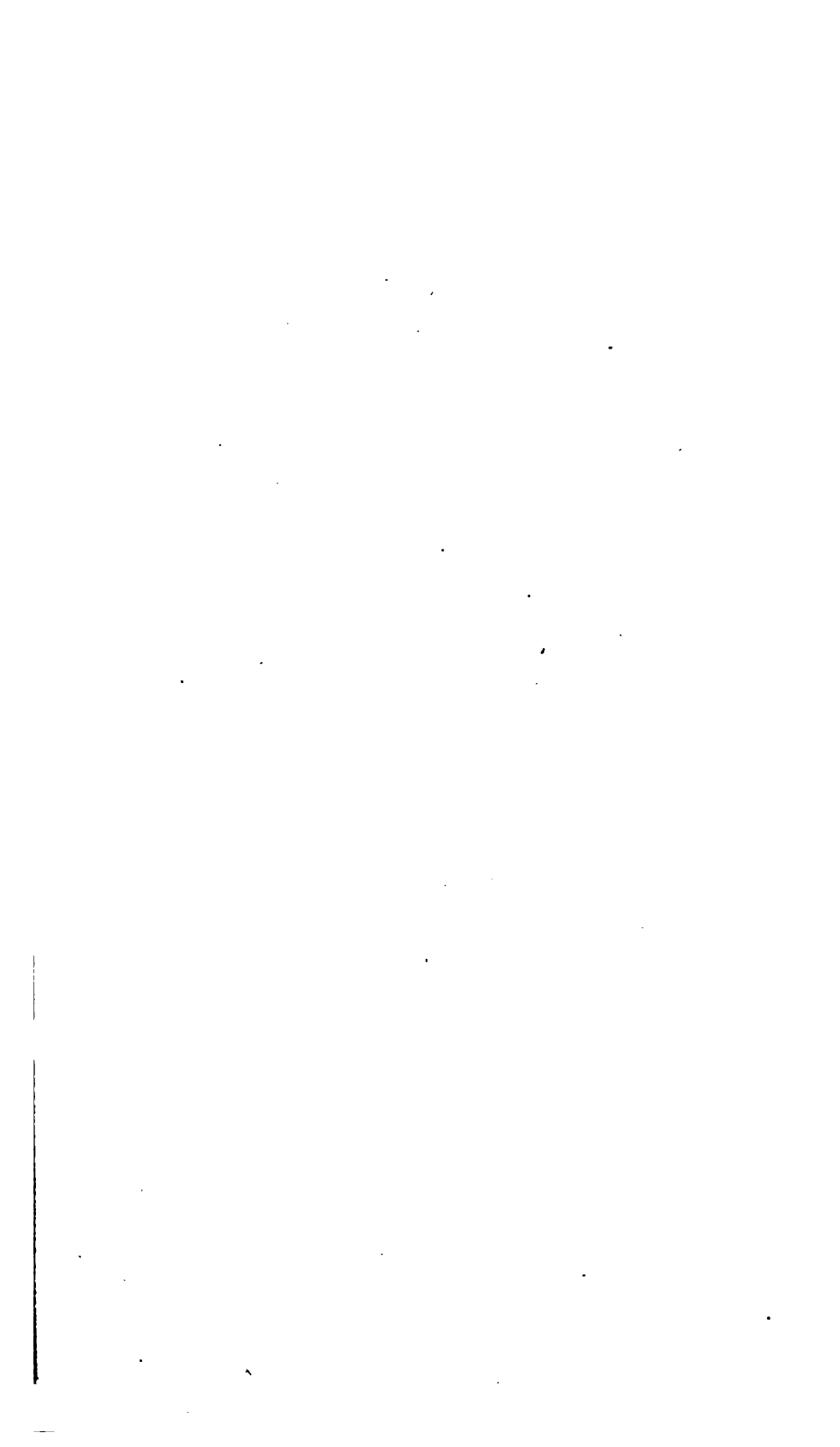
1. **WRITTEN INSTRUMENTS MUST BE CONSTRUED BY THE COURT,** except when they cannot be understood without reference to facts *dehors* the writing, in which case the jury, who are to inquire into the facts, should judge of the whole. *Watson v. Blaine*, 669.
2. **WRITTEN INSTRUMENTS, HOW CONSTRUED.**—In construing an instrument in writing, the whole must be considered; obscure parts may be explained by the parts which are clear; and the strict rules of grammar will not control a writing made by men who are not grammarians. *Id.*













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